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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.

v.

UNITED STATES OF AMERICA

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
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QUESTIONS PRESENTED

1. Whether, under the Fifth Amendment, in a "straight" condemnation of unimproved real property pursuant to 40 U.S.C. § 257, the date of taking for the purpose of calculating interest due, if any, on the award is (i) the date the landowner is effectively denied the economically viable use and enjoyment of the property or (ii) the date of payment of the award.

2. Whether the Supreme Court should resolve the conflict which exists on the above matter between the Fifth and Ninth Courts of Appeal.

3. Alternative to the first question, whether under 16 U.S.C. § 698 (the act establishing the Big Thicket National Preserve) the date of taking was (i) the date of valuation or (ii) the date of the filing of the commission's report or (iii) the date of the judgment or (iv) such other date as may be determined under the facts of this case.

4. Whether the Court of Appeals erred in failing to sustain the finding of the District Court that Kirby was deprived of the beneficial use of its property as of the filing of the complaint in condemnation, in the absence of a holding that such finding was clearly erroneous.

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Petitioner, Kirby Forest Industries, Inc. ("Kirby") petitions for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of such court in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A-1 — A-15, styled *United States of America* v. *2,175.86 Acres of Land*) is reported at 696 F2d 351. The opinion of the District Court (App. B, infra, B-1 — B-11) is reported at 520 F. Supp. 75.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. Kirby filed its motion for rehearing on February 5, 1983, which was denied by the Court by order entered on March 10, 1983 (App. C, infra). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) (1976).

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> ". . . nor shall private property be taken for public use without just compensation."

40 U.S.C. §257 (1976) provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The provisions of 16 U.S.C. §698, Pub. L. 93-439, Oct. 11, 1974, 88 Stat. 1254-61, the authority creating the "Big Thicket National Preserve," under which this condemnation proceeding was filed, are attached (App. D, infra, D-1 — D-7).

STATEMENT OF THE CASE

This action began on August 21, 1978, by the filing of a complaint in condemnation by the United States (hereafter the "Government") to acquire 2,175.86 acres of land owned by Kirby for part of the Beaumont Unit of the Big Thicket National Preserve in East Texas. Kirby is an integrated forest products manufacturer, owning timberlands in East Texas and Louisiana to supply the raw material for its manufacturing facilities.

The condemnation matter was referred by the District Court to Commissioners under Fed.R.Civ.P. 71A. At the opening of

the Commission's hearings, in response to the inquiry of the chairman regarding stipulations, a stipulation was announced by counsel for the Government and for Kirby that that day, ~~May~~ March 6, 1979, was the date of taking.

The instructions given by the District Court to the Commission included a definition of the phrase, "date of taking," as follows:

> "The 'date of taking' must be and is fixed as of the date the Government took possession of the land and denied the landowner its use and benefit."

All valuation testimony before the Commission was directed to the "date of taking" stipulated by the parties.

After the entry of the Commission's Report on March 3, 1980, and a review by the District Court of the parties' objections thereto, the court, on August 13, 1981, entered its judgment adopting the Commission's findings and awarding to Kirby the sum of $2,331,202.00, plus interest from August 21, 1978 (the date the complaint was filed) until the deposit of the award. The Government, on March 26, 1982, after the matter had been lodged on appeal to the Fifth Circuit Court of Appeals, and some *three years* after the stipulated date of taking, filed the award, including the interest increment, in the registry of the Court.

The District Court determined that the date of the taking was the date of the filing of the complaint (contrary to the stipulation of the parties), based upon the court's conclusion that the "condemnation proceedings instituted by the United States Government have effectively denied Defendant (Kirby) economically viable use and enjoyment of its property since it is prevented from continuing its timber business."

Both Kirby and the Government appealed. Kirby complained of the rate of interest allowed, of the failure of the court to consider and give effect to evidence of higher value and of the

Commission's lack of compliance with the reasoning specificity required by *United States* v. *Merz*, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964), and commented on the action of the Court in disregarding the "date of taking" stipulation. The Government complained of the granting of interest from the date of the filing of the complaint and also complained of the Commission's lack of compliance with *United States* v. *Merz*.

The United States Court of Appeals for the Fifth Circuit reversed, Judge Jolly concurring in part and dissenting in part. The majority held that because the Government had not taken actual possession, the date of the payment of the award was the date of taking and that, therefore, no interest was due, and remanded the case for compliance with *Merz*. Judge Jolly concurred in the remand because of the inadequacy of the Commission's report, but dissented on the question of the determination of the date of taking and, hence, the entitlement of Kirby to interest. Judge Jolly expressed the view that at least by the entry of a judgment in condemnation of unimproved property (distinguished from income-producing or improved property, which continues to provide benefits to the landowner) the landowner is "shackled from making economically viable use of his property," and, therefore, suffers a taking of his property at such time (if not before). While the majority explicitly rejected the holding of the Ninth Circuit on this question expressed in *United States* v. *156.81 Acres of Land*, 671 F.2d 336 (9th Cir.), cert. den. ____ U.S. ____, 103 S.Ct. 569, 74 L.Ed.2d ____ (1982), Judge Jolly specifically noted his agreement with such opinion.

REASONS FOR GRANTING THE PETITION

As stated by the Government in its Petition for Writ of Certiorari to this Court in the Ninth Circuit case mentioned above, *United States* v. *156.81 Acres of Land*,[1] "*(t)his case presents an*

[1] October Term, 1982, No. 82-552, cert. den., ____ U.S. ____, 103 S.Ct. 569, 74 L.Ed.2d ____. See Appendix, infra, App. E, E-

important and recurring question concerning the government's obligation to pay interest in straight condemnation cases." (emphasis supplied). The question is no less important in this case and, for the purpose of review by this Court, must be viewed as of significantly greater importance because of the conflict on this matter between the Ninth Circuit in *United States* v. *156.81 Acres of Land*, and the Fifth Circuit in this case, which conflict did not exist at the time of the prior petition.

There is, therefore, squarely presented for review a direct conflict between Federal Courts of Appeals, the character of reason for review specifically provided for in Rule 17.1(a) of the Rules of this Court.

There is presented at the same time an opportunity for this Court either to clarify its former opinion in *Danforth* v. *United States*, 308 U.S. 271, 60 S.Ct 231, 84 L.Ed. 240 (1939), the generality of which has led to varying interpretations regarding the determination of the entitlement to interest in condemnation cases, or to restrict such opinion to the facts there before the Court.

Of particular significance in this case is the impact of the intended public use — a wilderness preserve — upon the "possession and use" of the condemned tract by the landowner prior to both the judgment and the date of payment of the condemnation award.

We shall address each of the above elements in the short discussion to follow.

The obvious point of departure is the mandate of the Fifth Amendment that "just compensation" is required for the taking of private property for public use. While it is recognized that interest is payable only as a part of just compensation, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 67 S.Ct.

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1 — E-13 for the text of the Government's petition, excluding appendices.

398, 91 L.Ed. 521 (1947), the certainty that the compensation must be "just" requires the intervention of this Court to settle the recurring questions regarding the determination of the time of the taking.

The Government does not have the right or the power to prejudice the rights of a landowner by the manner in which the Government elects to proceed to condemn private property. Thus, the question is not whether the Government proceeds under a legislative taking, a declaration of taking under 40 U.S.C. § 258a (1976), or a "straight" condemnation under 40 U.S.C. § 257 (1976). The Fifth Amendment requires that whenever a taking for public use occurs, just compensation must be made. The question in the context of a straight condemnation, therefore, is whether a taking in fact has occurred prior to the payment of the award and, if so, when.

Is there a consistent analytic litmus which aids in the determination of whether a taking occurs prior to the date of payment in "straight" condemnations of unimproved real property? Is there a rational basis for distinction in this context between improved and unimproved property? The answer to both questions is, "yes." The test, long recognized by this Court and confirmed as recently as 1978 in *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is that a taking occurs when there is such an interference with the investment-backed expectations of the landowner that the uses and expectations of the landowner relating to the land are wholly frustrated. See *Goldblatt* v. *Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908). This principle found early and definitive exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) where a state statute forbidding the mining of coal under certain circumstances was held to constitute a taking of the rights of a coal company

because the statute effectively destroyed the right to mine for coal.

See also *United States* v. *Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), where overflights were held to have destroyed the present use of the property for a chicken farm, and thus constituted a taking.

Second, there is a rational and valid basis for distinction between unimproved and improved property in the "taking" context. The basis for distinction is inescapably intertwined with the interference analysis long made by this Court to determine the question of when a taking occurs. In this analysis, one of the "several factors that have particular significance," *Penn Central*, is the *economic impact* of the interference. While not alone controlling, the severity of the economic impact may be more readily ascertained — and will be relatively greater — in the case of property which has no income-producing use or potential other than the use which the interference prevents. Thus, a taking will be more readily demonstrated in the case of unimproved than improved, income-producing property, where the owner continues to receive *some* economic benefit.[2]

The Fifth Circuit in this case, contrary to the Ninth Circuit in *United States* v. *156.81 Acres*, placed great (and, apparently, controlling) emphasis on whether the Government had taken possession. It held (1) that "... the mere commencement of straight condemnation proceedings, where the government does not enter into possession during those proceedings does not constitute a taking," there citing a footnote from *Agins* v. *City of*

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[2] This distinction takes into consideration the frequently-cited rule that the mere entry of a judgment in condemnation does not constitute a taking (absent a prior taking) where the landowner continues to receive the economic benefit of the property until payment, possession or divestiture of title. See, e.g., *Danforth; Gould* v. *United States*, 301 F.2d 557 (D.C. Cir., 1962). Where, however, there is *no* economic benefit to be received, all benefits being frustrated by the governmental interference, such rule has no application.

Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) and (2) relying upon *Danforth*, that where the government condemns without entering into prior possession and there had been no previous taking " 'in actuality or by a statutory provision which fixes the time of taking by an event . . .' ", " 'the taking . . . [took] place upon the payment of the money award by the condemnor . . .' " (citing 308 U.S. at 284, 60 S.Ct. at 236, footnotes omitted).

The Fifth Circuit also was critical of the District Court here in what it referred to as speculation by the lower court that the government would not "permit the cutting of even one tree when the purpose of these proceedings is to preserve the land in question for public use as a wilderness park," holding that there was "no showing" made that the filing of the complaint "deprived the landowners of the use of their property so as to constitute a taking, . . ." despite the trial court's specific finding to the contrary.[3]

The Ninth Circuit, on the other hand, specifically addressed the situation where the deprivation reaches "taking" proportions prior to payment of the award and, in its reasoning, balanced the interests of the government and the landowner, holding that in cases such as the instant matter, "a condemnation judgment forces the landowner to hold property which generates liabilities but no benefits, perhaps excepting recreational benefits not present here . . . effectively (taking) the condemnee's land by denying any economically viable use."

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[3] The afterthought by the Fifth Circuit Court that recreational use would remain available to Kirby totally ignores the economic effect of the interference for which the Fifth Amendment requires compensation. In this respect, it is interesting to note that the Fifth Circuit apparently also ignored its own opinion in *Hernandez* v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), an inverse condemnation case, which held that a taking occurs if the landowner is denied any economically viable use of the land.

Not only is the condemnee burdened by the inability to make any economically viable use, said the Ninth Court, but, in addition, "No one would buy land which the government could take at an already settled price (and) (no) landowner would build on land which the government could take for the price of the land before it had been improved."[1]

The reasoning of the Ninth Circuit, we submit, is consistent with, while that of the Fifth Circuit is contrary to, the mandate of the Fifth Amendment that compensation shall be "just." The fallacy in the reasoning of the Fifth Circuit Court is that it is not the possession, *vel non*, of the government or the "accretion of a right or interest to the sovereign" which constitutes the taking, but the deprivation of the owner which is the operative event. *United States* v. *Rogers*, 255 U.S. 163, 41 S.Ct. 281, 65 L.Ed. 566 (1921); *Seaboard Air Line Railway Co.* v. *United States*, 261 U.S. 299, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *United States* v. *General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *Dugan* v. *Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d. 15 (1963). The proper thrust of this emphasis was underscored by this Court most recently in *Penn Central*, where the Court, in footnote 25, (438 U.S. at 123) said:

> "As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel."

The fallacy of requiring possession by the Government in order to support a "taking" is made even clearer under the facts of our case. The purpose of the condemnation was to preserve a

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[1] The Government is protected in its interests under this rationale, however, because, as noted in *Danforth*, it still has the right to determine "whether the valuations leave the cost of completion within his resources," *Danforth*, 308 U.S. at 284, and thus may yet dismiss, subject to review by the District Court under Rule 71A(i)(3), Fed. R. Civ. P.

wilderness. This purpose is totally inconsistent with any development or use of the land, particularly for timber growing and cutting to provide resources to a forest products manufacturer. It is not necessary, moreover, in order to preserve a wilderness in its pristine condition, that the Government actually take possession. No construction of a building, dam or levee is necessary to accomplish the purpose of the taking. In fact, the *absence* of possession is more consonant with the purposes of the condemnation. Under the rationale of the Fifth Circuit Court, Kirby stands penalized for supporting the purpose of the Big Thicket National Preserve by refraining from doing what the Fifth Circuit's rationale would entitle them to have done: *cut down the trees.* The logical extension of the Court's reasoning could result in the total frustration of the intent of Congress by allowing a landowner to ruin the "wilderness," which the condemnor obviously would not permit, yet the Fifth Circuit held that the Government, "had not substantially interfered with the landowner's rights in their property prior to payment, . . ."

Further, it is clear that *Danforth* does not require the result reached by the Fifth Circuit Court. We address the *Danforth* holdings directly although there are reasonable grounds for distinction.[5]

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[5] Principal among the grounds for distinction are:

1) this Court, in *Danforth*, specifically limited its holdings to condemnations under the Flood Control Act of May 15, 1928, 33 U.S.C. §§ 702a-702m;

2) the case was not a condemnation case, but was one to enforce a contract between the landowner and the government fixing value for acquisition;

3) the case, by reason of the preceding ground, "passed out of the range of the Fifth Amendment," *Albrecht* v. *United States*, 329 U.S. 599, 67 S.Ct. 606, 91 L.Ed. 532 (1947), and thus is not authoritative on the question of the scope of the Fifth Amendment in the determination of a date of taking under facts differing from those found in *Danforth;*

First, *Danforth* does not require a holding that the date of payment is the date of taking in straight condemnation cases. This Court was careful to note that such result would not follow where ". . . a taking has occurred previously in actuality . . . , which fixes the time of taking by an event such as the filing of an action, . . ." 308 U.S. at 284. The eventuality is preserved, therefore, that a taking may occur prior to the date of payment.[5]

The *Danforth* court further held that, "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." This analysis, however, does not address the situation, where, as here, the governmental interference wholly frustrates the use of the property by the landowner by depriving him of any economically viable use. By the generality of such language, lower courts may have been led into more restrictive holdings (as was the Fifth Circuit here) than the proper construction of the Fifth Amendment allows. For instance, the Fifth Circuit in its opinion in this case said "*Danforth* holds that a taking does not occur until payment is made . . ." 696 F. 2d at 356. Clearly, *Danforth* does not so hold.

Finally, it must be said that *Danforth* does provide a test for the determination of when taking occurs in a case such as this. In its discussion relating to the construction of the set-back levee in that case, the Court held that for the completion of the levee

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4) construction activities were contemplated by the Flood Control Act construed in *Danforth* which would effect a taking only when completed according to specification. Here no possessory act by the government is contemplated by the act creating the Big Thicket National Preserve in order to give effect to the purpose of the condemnation.

[5] This Court, therefore, need not overrule *Danforth* in order to uphold the correct Ninth Circuit reasoning applicable to the questions presented here.

to amount to a taking, "it must result in an appropriation of the property to the uses of the government." 308 U.S. at 286.

Remembering that actual possession is not required, *Penn Central*, the question here becomes whether and at what point in time the actions of the Government effectively resulted in "an appropriation of the property to the uses of the government," *consistent with the purposes of the interference*, by denying to the landowner the economically viable use for which the property was being held.

What are the "uses of the government" in a condemnation for a wilderness preserve? Such "uses" are simply to accomplish *non-use* by the owners, thereby preventing utilization of the property in any manner inconsistent with the integrity of the lands as a wilderness. How is this "use" accomplished? Must the landowner threaten or undertake a conflicting use in order to force the Government to act to stop him (thereby establishing a possessory act by the Government)? We are not without guidance from this Court in answering these questions: it is the "character of the governmental action," which here has "particular significance," *Penn Central*, 438 U.S. at 124. The character of the governmental action here was to seek to establish a wilderness preserve, first by the declaration of the purpose, followed by the institution of condemnation proceedings. This goal is effectively accomplished by "chilling" activity relating to the designated lands so as to prevent uses conflicting with the goal. We submit that neither actual possession by the Government nor threats of conflicting use nor an injunction or other order are required to evidence the chilling of activity which accomplishes the "uses of the government." It is clear, then that the mere existence of the proceedings is sufficient to cause a forest products manufacturer to refrain from harvesting its trees, thereby resulting in an "appropriation" of the economic purpose for which the land was being held. Further, neither sale nor development of the land was possible, both being effectively "chilled" by the existence of the condemnation proceedings.

There can be no question but that the purposes of the Government were accomplished here long before the payment of the award.[7]

The question remains, at what point in time did the taking occur in this case? Logically, from the foregoing discussion, the date of the filing of the complaint, as found by the District Court, is the obvious choice, particularly because by that time the Government had not only designated the lands to be included in the preserve, as required by the statute [See 16 U.S.C. 698(b)], and had published the descriptions, but had also begun the formal procedures to obtain title to the lands. Although conflicting uses may have been chilled prior to the filing of the complaint, most certainly the chilling effect was complete by such time and, further, by that time the Government had definitely asserted its intent to take the property and had taken all of the steps required for the taking except for payment of the award, and could no longer dismiss the case at will under Rule 71A, Fed. R. Civ. P. See *Gerlach Livestock Co.* v. *United States*, 76 F.Supp. 87 (Ct.Cl., 1948), aff'd, 339 U.S. 725, 70 S.Ct. 995, 94 L.Ed. 1231 (1950); and see *United States* v. *59.29 Acres of Land*, 495 F.Supp. 212 (E.D. Tex., 1980).

The above result does not unduly restrict or abridge the rights of the sovereign discussed in *Danforth*. For example, it does not commit the Government to the payment of interest prior to the determination of the award. The interest portion of the award is merely calculated from the date of taking. Also, the Government could still withdraw from the condemnation. In addition, the Government could prevent the accrual of interest at any time by the depositing of funds in the registry of the Court.

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[7] That Kirby agreed to refrain from cutting the timber, as noted by the Fifth Circuit in its opinion, 696 F.2d at 355, doing so without an order from the Government that it so refrain, is itself evidence of the chilling effect of the action by the Government.

The choice of the date of filing is not out of harmony with the choice of the date of judgment by the Ninth Circuit Court in *United States* v. *156.81 Acres of Land*, supra. Each choice is predicated on a determination, based upon the facts of each case, of the time when the action of the government "effectively takes the condemnee's land by denying any economically viable use," id. 671 F.2d at 339.[8] The basic point of conflict between the two Circuits regarding the distinction between improved and unimproved property is therefore resolvable under the facts of this case.

Further, it should be pointed out that if the Fifth Circuit view should prevail, the government would be given the authority to delay payments of awards literally for years, (as it has done here) and thereby avoid the payment of interest, despite the fact that the landowner is effectively prevented from any use of his property in the interval. Based upon an overbroad application of *Danforth*, such view is without support under the correct analysis required by Fifth Amendment and posited here.

There remains one additional consideration relevant to the determination of the time period during which interest should be due. From the inception of this case, Kirby has regarded the "date of taking" concept as a term of art. The parties stipulated that *the date of the hearing* before the Commissioners was the date of taking. The stipulation was entered into formally [not informally as in *United States* v. *Mahowald*, 209 F2d 751 (8th Cir., 1954), relied upon by the Court of Appeals in refusing to give effect to the stipulation] and under circumstances indicating

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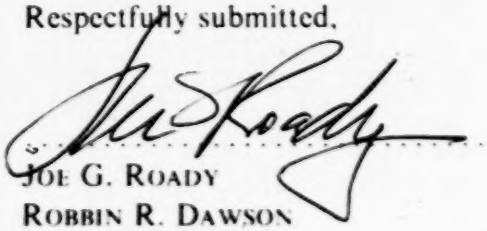
[8] The Ninth Circuit, in later case involving the same project, *United States* v. *15.65 Acres of Land*, 689 F.2d 1329 (9th Cir., 1982), again held that when the owner had been deprived "of all economic use of his land," a taking occurs, but it also held that the date of taking in that case was the date of *valuation* rather than the date of the judgment, applying a rule of "justness and fairness" based upon *Penn Central*.

intention to provide certainty not only as to the date of valuation, but also as to all other effects of that term of art in condemnation matters. Kirby concedes, therefore, that interest should *not* begin on the date of the filing of the complaint, even though that date is the proper date of taking absent the effectiveness of the stipulation. Such concession requires that interest be calculated from the date of the hearing even though the date of taking may have preceded that date, unless this and the other courts may properly disregard the stipulation of the parties. Compare *Fibreboard Paper Products Corp.* v. *United States*, 355 F.2d 752 (9th Cir., 1966) and *United States* v. *15.65 Acres of Land*, supra, note 8.

CONCLUSION

To review these important questions relating to Federal condemnations and to resolve the conflict thereon between the Fifth and Ninth Courts of Appeals, this petition for writ of certiorari should be granted.

Respectfully submitted,



JOE G. ROADY
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Of Counsel:
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UNITED STATES of America, Plaintiff-Appellant Cross Appellee,

v.

2,175.86 ACRES OF LAND, MORE OR LESS, SITUATED IN HARDIN AND JEFFERSON COUNTIES, STATE OF TEXAS, et al., Defendants,

Kirby Forest Industries, Inc., Defendant-Appellee Cross Appellant.

UNITED STATES of America, Plaintiff-Appellant,

v.

13.32 ACRES OF LAND, MORE OR LESS, SITUATE IN JEFFERSON COUNTY, STATE OF TEXAS, Bob C. Mabry, et al. and Unknown Owners, Defendants-Appellees

Nos. 81-2402, 81-2471.

United States Court of Appeals, Fifth Circuit.

Jan. 24, 1983.

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

RANDALL, Circuit Judge:

These two consolidated cases present the question whether the United States is obligated to pay interest on an award in a straight condemnation proceeding, and if it is, from what date the interest should accrue. The first of these cases, *United States v. 2,175.86 Acres of Land*, also involves a challenge to the sufficiency of the commission's findings concerning the actual award. For the reasons set forth below, we reverse, 520 F.Supp. 75, and remand for proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 11, 1974, Congress established the Big Thicket National Preserve in southeast Texas, and authorized the Secretary of the Interior to acquire the land within the boundaries of

the preserve. 16 U.S.C. § 698 (1976). These cases involve the acquisition of 2,175.86 acres of land located in Hardin and Jefferson Counties, Texas, and approximately 13.32 additional acres in Jefferson County, Texas.

The larger tract was owned by Kirby Forest Industries. On August 21, 1978, the United States filed a complaint in condemnation seeking to condemn the Kirby tract. The action was referred to a commission appointed pursuant to Fed.R.Civ.P. 71A. The trial was held in March of 1979. On March 3, 1980, the commission entered its report recommending an award of $2,331,202.00. Both the United States and Kirby filed objections to the commission's report in April, 1980. The district court held a hearing to consider these objections in January, 1981, and entered a judgment on August 13, 1981, awarding Kirby the amount proposed by the commission plus interest at the rate of six percent from August 21, 1978 (the date the complaint was filed), until the date of deposit of the award. The United States filed a notice of appeal on October 8, 1981, and Kirby filed its notice on the 9th. Payment was made on March 26, 1982.

At the opening of the trial before the commission, the parties stipulated that "today is the date of taking" so that the trial date could serve as the date on which market value could be determined. Both sides presented expert testimony concerning the highest and best use of the property and the physical description of the land.

The United States filed a second complaint in condemnation to obtain the smaller tract owned by Bob C. Mabry and his associates. The landowners filed an answer, demanding an award of just compensation, expenses, attorneys' fees and interest on the award. As in the first case, the action was tried before a commission. On January 24, 1980, the district court entered judgment in the amount of $94,998.24, as recommended by the commission. The judgment was vacated in February, 1980, and an amended judgment entered on April 3, 1980, which reserved

for consideration the landowners' request for attorneys' fees, expenses and interest. On April 17, 1980, the government deposited the full amount of the award with the court. On September 28, 1981, the court denied the landowners' claim for expenses, but granted interest on the award at the rate of six percent from the date the complaint in condemnation was filed. Upon a motion of the landowners filed on October 9, 1981, the court amended its judgment to allow interest at the rate of nine percent, as provided by state law. The United States filed two notices of appeal.

II. INTEREST FROM THE TIME OF TAKING.

The government may appropriate property for public use in a number of ways: by physical occupation, *United States* v. *General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); by the bringing of condemnation cases as in the present case, *United States* v. *Bodcaw Co.*, 440 U.S. 202, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979) (per curiam); or by vesting in the government immediate title to the property through legislative action. *Miller* v. *United States*, 209 Ct.Cl. 135, 531 F.2d 510 (1976). When the government proceeds by condemnation, it generally employs one of two methods: (1) a declaration of taking or (2) "straight condemnation." Under the Declaration of Taking Act, 40 U.S.C. §258a (1976), the government obtains title to the land immediately upon filing a declaration of taking and depositing the estimated amount of just compensation with the court. If just compensation as judicially determined is greater than the deposit, the government must deposit the difference with interest from the date of taking.[1]

In the cases before us, the government employed the "straight condemnation" method by filing a complaint in condemnation pursuant to 40 U.S.C. §257 (1976). Unlike section 258a, section

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[1] The government need only pay interest on the deficiency, since the amount on deposit has already been paid. 40 U.S.C. §258a; *see also United States* v. *Blankinship*, 543 F.2d 1272, 1275 (9th Cir. 1977).

257 does not state that title shall vest immediately in the United States once the action is commenced. The question before us is when the government proceeds by straight condemnation, what is the date of taking.

We note at the outset that both parties agree, as indeed they must, that where there is a delay between the time of taking and the time of payment, the landowner is entitled to interest as a part of just compensation. This entitlement is constitutionally mandated by the fifth amendment for just compensation "is the full and perfect equivalent of the property taken." *Seaboard Airline Railway Co.* v. *United States*, 261 U.S. 299, 304, 43 S.Ct. 354, 355, 67 L.Ed. 664 (1923). This rule "rests on equitable principles and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken." *Id.; see also United States* v. *Rogers*, 255 U.S. 163, 41 S.Ct. 281, 65 L.Ed. 566 (1921). Where a taking precedes payment, the landowner "is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added." *Seaboard*, 261 U.S. at 306, 43 S.Ct. at 356. We must turn then to the question of when the taking occurred in these cases.

The district court awarded interest from the date the complaints were filed until the time that payment was made, reasoning that the commencement of condemnation proceedings "effectively denies [the landowners] economically viable use and enjoyment of [their] property . . ." Record at 573. Mabry would have us adopt the date the Big Thicket National Preserve was established by statute as the date of taking, on the ground that the statute represented the government's commitment to the project. In essence, he maintains that the statute was actually a legislative taking. Kirby concedes that it can find no support for the district court's position; it argues instead that the date of

taking was the date of trial. The government contends, relying on *Danforth* v. *United States*, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939), that a taking did not occur until the date of payment, in which case no interest was due. We agree with the government that no interest was due in these cases.

Mabry's argument is easily disposed of. The legislative history of 16 U.S.C. §698 indicated that Congress did not intend the statute to be a legislative taking; in fact, the Senate committee specifically deleted the legislative taking provision because is felt that "legislative taking is an extraordinary measure which should be invoked only in those instances in which the qualities which render an area suitable for national park status are imminently threatened with destruction. The Committee does not believe that the Big Thicket area represents such an instance." S.Rep. No. 875, 93d Cong., 2d Sess. (1974), *reprinted in* 1974. U.S.Code Cong. & Ad.News 5554, 5558.[2]

In *Danforth*, the Supreme Court held that the mere enactment of legislation which authorizes condemnation could not be a taking, because "[s]uch legislation may be repealed or modified, or appropriations may fail." 308 U.S. at 286, 60 S.Ct. at 237 (footnote omitted). The Court went on to hold that for an action to constitute a taking, "it must result in an appropriation of the property to the uses of the Government." *Id.* (footnote omitted). No such appropriation occurred through the enactment of 16 U.S.C. §698. Mabry has not demonstrated that the enactment of the statute interfered with his enjoyment of his property or his present expectations for its use. *See Agins* v.

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[2] Mabry casts aspersions on Congress's decision to delete the legislative taking provision, suggesting that the decision was designed solely to avoid the government's obligation to pay interest. Congress was actually concerned about the possible postponement of the acquisition of previously authorized areas, as well as the problem of paying interest. S.Rep. No. 93-875, *supra*. We note further that there is nothing in the fifth amendment that prohibits the government from choosing the least costly method of acquiring property as long as the requirements of just compensation are met.

Tiberon (sic), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The property was purchased as an investment, and it has remained in the same condition throughout the condemnation proceedings. Accordingly, we hold that the enactment of the statute establishing the preserve was not a taking within the confines of the fifth amendment.

Similarly, the mere commencement of straight condemnation proceedings, where the government does not enter into possession during those proceedings, does not constitute a taking. *Agins, supra*, 447 U.S. at 255, n. 9, 100 S.Ct. at 2138 n. 9, 65 L.Ed.2d at 106 n. 9; *see also United States* v. *156.82 Acres of Land*, 671 F.2d 336 (9th Cir.), *cert. denied*, ... U.S. ...., 103 S.Ct. 569, 74 L.Ed.2d .... (1982). The Supreme Court held in *Agins:*

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. More fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

447 U.S. at 255 n. 9, 100 S.Ct. at 2138 n. 9, 65 L.Ed.2d n. 9 (citing *Danforth, supra*, 340 U.S. at 285, 60 S.Ct. at 236). The government did not enter into actual possession of Kirby's or Mabry's properties prior to payment, and indeed it apparently has yet to take possession of the properties. The district court recognized that the diminution of property value standing alone would not constitute a taking. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.2d (sic) 303 (1926); but it speculated that the government would not "permit the cutting of even one tree when the purpose of these proceedings is to preserve the land in question for public use as a wilderness park." Record at 573. Kirby conceded in oral argument,

however, that while it and other landowners had voluntarily agreed, long before the commencement of these proceedings, not to cut timber on the land within the preserve, it was under no orders from the government not to reinstate logging operations. Since there has been no showing made that the filing of the complaint deprived the landowners of the use of their property so as to constitute a taking, the district court's award of interest from the date of filing must be reversed.

In *Danforth*, the United States condemned the landowner's property pursuant to the Flood Control Act of May 15, 1928, 33 U.S.C. §§702a 702m (1976). As in the cases before us, the government proceeded by petitioning for condemnation without entering into prior possession. The Supreme Court held that under those circumstances, where there had been no previous taking "in actuality or by a statutory provision, which fixes the time of taking by an event . . .," that "the taking in a condemnation suit under the statute [took] place upon the payment of the money award by the condemnor," and that no interest was due on the award. 308 U.S. at 284, 60 S.Ct. at 236 (footnotes omitted). The Court reasoned:

> Until the taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, . . ." A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

Id. at 284-85, 60 S.Ct. at 236 (footnotes omitted).

In arguing that the date of taking was the date of trial, Kirby maintains that *Danforth* only applies to takings under the Flood Control Act. Other circuits have not so limited *Danforth*, *see United States* v. *Gould*, 112 U.S.App.D.C. 233, 301 F.2d 557 (1962); *United States* v. *Mahowald*, 209 F.2d 751 (8th Cir.1954); *United States* v. *Johns*, 146 F.2d 92 (9th Cir.1944); and we do not believe such a limitation is appropriate. While the Court specifically discussed a taking under the Flood Control Act, the broad language of the case, as well as its reasoning, is equally applicable here. The Court in *Danforth* adopted the date of payment as the time of taking specifically because the Flood Control Act did not prescribe a statutory date, as is the case under 40 U.S.C. § 257. The Supreme Court held in *Danforth* that a taking did not occur until payment was made where the government proceeded by a petition for condemnation, because title did not pass to the government until the landowner had received compensation. Contrary to the statement made by a district court in another case involving the Big Thicket National Preserve, *United States* v. *59.29 Acres of Land*, 495 F.Supp. 212, 215 (E.D.Tex.1960)(awarding interest from the date of the filing of the commission's report), the government's commitment to the project does not ripen from "conjecture" to "certainty," at the time of the hearing. *Danforth* holds that a taking does not occur until payment is made, because the government may back out of the project up until the date of payment. Just as in *Danforth*, the government could have decided not to acquire Kirby's and Mabry's lands until it had paid for them and obtained title. Further, as in *Danforth*, the government has not yet appropriated the landowners' property to the uses of the government. In fact, Danforth had suffered more injury than the landowners here, since his land had already been flooded as a result of the government's flood control operations.

Kirby's next contention is that *Danforth* does not apply because the parties stipulated that the date of trial was the date

of taking. The government maintains that this stipulation was entered into solely for the purpose of establishing a valuation date. Our review of the proceedings indicates that this was in fact the case. As the Eighth Circuit noted in *Mahowald*, 209 F.2d at 754, the stipulation did not deprive the owners of the enjoyment of their lands, nor did it give the government any interest in those lands. The stipulation did no more than establish a date from which the value of the property could be determined.

The landowners maintain that it would be unjust to deny them interest where the valuation date is different from the date of payment, because the value of their property may have risen in the interim. The fifth amendment requires compensation for the value of the property on the date of taking. *United States* v. *Reynolds*, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970). The landowners contend that interest is a convenient method of assuring adequate compensation where property values may have risen during the delay between the valuation date and payment. *See Fibreboard Paper Products Corp.* v. *United States*, 355 F.2d 752 (9th Cir.1966) (awarding interest for the delay between the time of taking and payment). The landowners have made no showing that property values have in fact risen, and we see no reason to award interest on the basis of speculation about rising property values.

Finally, the landowners urge us to follow the Ninth Circuit's decision in *United States* v. *156.81 Acres of Land*, 671 F.2d 336 (9th Cir.), *cert. denied*. ..... U.S. ....., 103 S.Ct. 569, 74 L.Ed.2d ..... (1982). The Ninth Circuit held in *156.81 Acres of Land* that interest should accrue from the date of judgment until the date of payment where the condemned property was unimproved. The court reasoned:

> In cases like this one involving vacant, unimproved land, a condemnation judgment forces the landowner to hold property which generates liabilities but no benefits, perhaps

> excepting recreational benefits not present here. Absent recreational benefits, the judgment effectively takes the condemnee's land by denying any economically viable use. No one would buy land which the government could take at an already settled price. No landowner would build on land which the government could take for the price of the land before it had been improved. Where the property is income-producing, the condemnation judgment is not a taking, because it does not render the property economically nonviable.

671 F.2d at 339 — 40 (citations omitted). We are unpersuaded by the Ninth Circuit's distinction between improved and unimproved property. Whether or not the property is improved, the judgment in condemnation does not deprive the landowner of a present use. The rented property continues to provide rent; the wilderness property continues to provide recreational uses.

The Ninth Circuit noted further that "[m]aking the date of judgment the date of taking in this situation encourages the government to act promptly once a judgment is issued, since interest begins to accrue at that time." 671 F.2d at 340. The Ninth Circuit viewed the judgment as a finalization of the proceedings, in that it informs the government of the cost of acquiring the property so as to enable it to determine whether it can afford the acquisition and it further limits the landowner's ability to dispose of his property. *See also United States* v. *59.29 Acres of Land, supra.* We need not decide today whether there might be circumstances under which the delay between judgment and payment would warrant an award of interest as part of the award of just compensation. The dates of judgment and payment in these cases were relatively contemporaneous and, as mentioned above, there is no evidence in these cases of a rise in value for the properties between the two dates, which might make the earlier valuation date unjust. In Mabry's case, payment was made two weeks after the amended judgment was

entered, and in Kirby's it was made eight months after judgment.[3]

We hold, on the authority of *Danforth, supra*, that under the circumstances of this case, where (1) the government has proceeded by the straight condemnation method, and (2) the government has not entered into actual possession or substantially interfered with the landowners' rights in their property prior to payment, the date of taking is the date of payment. It is on this date that title actually passes to the government. Therefore, there was no interest due as part of the award of just compensation to the landowners.

III. THE SUFFICIENCY OF THE COMMISSION'S FINDINGS.

Both parties in the Kirby case have challenged the sufficiency of the commission's report and findings. The district court accepted the commission's report and recommendations, ruling that the commission's findings were not clearly erroneous.

While the clearly erroneous standard of review applies to the commission's findings, Fed.R.Civ.P. 71A, conclusory findings alone are not sufficient. *United States* v. *Merz*, 376 U.S. 192, 198, 84 S.Ct. 639, 643, 11 L.Ed.2d 629 (1964). The Supreme Court stated in *Merz* that "conclusory findings as made in these cases are normally not reviewable by that standard, even when the district court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence." *Id.* In *United States* v. *Trout*, 386 F.2d 216, 224 (5th Cir. 1967), we held that *Merz* required the commission to give reasons for its conclusions to enable the reviewing court to determine the reasoning process underlying the commission's decision. More recently, we held that "[t]he paths

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[3] There was a three year delay between the trial and payment in Kirby's case. This delay, however, was not attributable solely to the government. The commission took a year to file its report and then both parties filed objections to the commission's findings.

followed by the commission in reaching the amount of the award shall be distinctly marked, . . . if not blazed with an array of findings of subsidiary facts that demonstrate that the ultimate finding is soundly and legally based." *Georgia Power Co. v. 138.80 Acres of Land*, 596 F.2d 644, 649 (5th Cir. 1979), *vacated and remanded on other grounds*, 617 F.2d 1112 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 936, 101 S.Ct. 1403, 67 L.Ed.2d 372 (1981) (citation omitted).

We agree with the parties in this case that the commission's report is inadequate and that the case must be remanded for further findings. The parties have cited numerous examples where the report could use further elaboration. For example, the government points out that there is no acreage breakdown for the various uses of the property, although some of the uses are incompatible. Further, the report inadequately discusses the testimony of the landowner's appraiser, Willard Hall. The United States moved to strike that testimony, on the ground that Hall had failed to reduce his valuation testimony to reflect what Kirby conceded to be an error in the computation of timber value. The government claimed a number of other errors in Hall's valuation of the timber, as well as in his estimate of highest and best use. Kirby also asserts inadequacies in the report and contends further that the commission should have added on value for the unique nature of the property.

The parties have asked us to rule on a number of the issues that were not addressed adequately below, specifically whether Hall's testimony should have been stricken and whether the commission should have considered the unique qualities of the property. We decline to give what would be in effect an advisory opinion. Rather, we remand the case to the district court for a determination of the various issues raised by the parties, with instructions to follow the guidelines established by *Merz* and its progeny.

IV. CONCLUSION.

We hold (1) that the landowners were not entitled to interest as part of the award of just compensation; and (2) that the commission's report in the Kirby case was inadequate and the case should be remanded for further proceedings consistent with this opinion.

REVERSED in part and REMANDED.

JOLLY, Circuit Judge, concurring in part and dissenting in part:

Judge Randall has written her usual fine opinion.

Quite aside from the quality of her opinion, however, because of the different way I look at this case, I can concur only with that part of the majority's opinion which holds that the commission's report in the Kirby case was inadequate and remands that case for further proceedings. *Merz* requires this result where the commission's report fails to follow certain guidelines. However, I strongly suspect that the result will not be much different than the one we are here presented and as a practical matter compliance with this remand will be a waste of time and money. Our remanding this case will, for sure, do nothing to assure those who worry about the various burdens of protracted litigation; but it was brought on, indeed required, by the inadequate work product of the commission.

I, cannot, however, concur in that part of the majority's opinion which holds that the property owners were not entitled to interest from the date of judgment as part of the award of just compensation. The majority has decided that when the government proceeds under the general condemnation statute, 40 U.S.C. § 257, that no distinction can be made, for purposes of determining when a taking occurs, between unimproved property and improved property. Such a decision does not take into proper account the marked difference in the effect of a condemnation judgment on an owner of unimproved property and,

in my opinion, denies him the just compensation to which he is entitled, Therefore, I dissent.

In the case of improved property, the condemnation judgment is not a taking, because the property continues to provide economic benefits to the property owner. *United States* v. *Mahowald*, 209 F.2d 751, 754 (8th Cir.1954). In the case of unimproved property, however, once a condemnation judgment is entered, the owner is, at least at that point if not before, shackled from making economically viable use of his property. As a practical matter, he cannot sell his land or make improvements upon it. Naturally, a landowner will not improve or build on property which the government could take for the price of land before it had been improved. Of course, no one is going to buy land which the government could take at an already settled price.

There is usually no need for the government to delay for months in deciding whether it wishes to buy unimproved property once a price has been established. It is, at a minimum, a terrible inconvenience to the property owner to be left thus suspended. By awarding interest from the date of the judgment, it seems to me that we would encourage the government to act as promptly as the circumstances may permit. At the very least, just compensation will be awarded to the owner who has remained liable for all expenses relating to the property, but who has received no income from it and has been prevented, for all practical purposes, from developing or disposing of it.

I find nothing in *Danforth* v. *United States*, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939), which would require us to hold that the taking occurred at the time of payment. *Danforth* expressly excepted cases where a taking has occurred before the condemnor pays the property owner, and in my thinking a "taking" has occurred for all practical purposes in this type of case once the judgment has been entered, if not before. In addition, there is no *per se* rule that no taking occurs until money changes

hand or title passes. *United States* v. *Dow*, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).

It is obvious, therefore, that I am more in agreement with the decision of the Ninth Circuit in *United States* v. *156.81 Acres of Land*, 671 F.2d 336(9th Cir.1982), *cert. denied*, ...U.S. ....., 103 S. Ct. 569, 74 L.Ed.2d .....(1982), than with the majority in our case. I would hold that in condemnation cases involving vacant, unimproved land, condemnees are entitled to interest from at least the date of judgment if there is no act on the part of the government occurring before judgment which constitutes a taking.

UNITED STATES of America

v.

2,175.86 ACRES OF LAND, MORE OR LESS, SITUATED IN HARDIN AND JEFFERSON COUNTIES, STATE OF TEXAS, and Kirby Forest Industries, Inc., et al., and Unknown Heirs.

Civ. A. No. B-78-598-CA.

United States District Court,
E. D. Texas,
Beaumont Division.

July 27, 1981.

MEMORANDUM OPINION

ROBERT M. PARKER, District Judge.

This is a land condemnation case. According to the Report and Findings filed March 3, 1980, the Land Condemnation Commission found that the "highest and best" use is varied as portions of the land are best used for rural subdivision, waterfront housing and recreational use, timber growing and sand pit operations. The Commission found that the 2,175.86 acres of land subject to condemnation has a value of $2,331,202.00. Objections to the Commission's Report were filed by both the government and Defendant Kirby Forest Industries (K.F.I.). Pursuant to Rule 53(e)(2) and Rule 71A of the Federal Rules of Civil Procedure, the Court held a hearing to consider the Commission's Report and the objections made thereto.

The scope of review is limited. "The Court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions"; however, "in an action to be tried without a jury, the Court shall accept the master's findings of fact unless clearly erroneous." Fed.R.Civ.P. 53(e)(2) & 71A(h); *United States* v. *Merz*, 376 U.S. 192, 198, 84 S.Ct. 639, 643, 11 L.Ed.2d 629 (1964); *Livas* v. *Teledyne Movible Offshore, Inc.*, 607 F.2d 118, 119 (5th Cir. 1979). The findings of the Commission, to the

extent that the Court adopts them, shall be considered as the findings of the Court. Fed.R.Civ.P. 52(a) & 71A(h). It is the opinion of the Court that the findings of the Commission are sufficient and are reviewable by the "clearly erroneous" standard prescribed by the Federal Rules of Civil Procedure and in accordance with *United States* v. *Merz, supra.* Upon review of the Commission's Report and Findings and the objections thereto, the Court finds that the Commission's findings are not clearly erroneous as asserted by the parties, adopts such findings as its own, and overrules the objections of the parties except as to the issue of pre-judgment interest which was not discussed in the Report and Findings of the Land Condemnation Commission.

CONDEMNATION PROCEEDINGS GENERALLY:

The government employs two general types of condemnation proceedings: 1) declaration of taking and 2) straight condemnation. Under the Declaration of Taking Act, 40 U.S.C. §§ 258a-258e, a taking occurs and the government obtains title to the land immediately upon filing a declaration of taking and depositing into the court the estimated amount of just compensation. If just compensation, as judicially determined, is found to be greater than the deposit, the statute requires the government to deposit the difference with interest from the date of taking. The deposit of an amount estimated to be just compensation relieves the government of the burden of paying interest on that amount. *United States* v. *Dow,* 357 U.S. 17, 23, 78 S.Ct. 1039, 1045, 2 L.Ed.2d 1109 (1958).

Should the government proceed with a straight condemnation proceeding as in the instant case, a complaint in condemnation will be filed pursuant to 40 U.S.C. § 257 and Federal Rule of Civil Procedure 71A. Where that method is utilized, the landowner retains possession and use of the land until after a trial and the payment of the award. Unless a taking has previously occurred, title does not pass and the taking does not occur until the award is paid; consequently, no interest is due upon the

award. *Danforth* v. *United States*, 308 U.S. 271, 284-85, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939).

CONTENTIONS OF THE PARTIES:

Defendant K.F.I. admits that no declaration of taking was filed, however, K.F.I. contends that it is entitled to prejudgment interest because 1) the parties stipulated that the date of taking was March 6, 1979 and, therefore, prejudgment interest should be calculated from that date; and 2) just compensation requires that K.F.I. be compensated for all injury occasioned by the taking. K.F.I. claims that, despite the absence of a declaration of taking, K.F.I. has been deprived of the enjoyment of any benefits of ownership and has borne all the burdens of ownership, including taxation, from the inception of these proceedings until the present. K.F.I. argues that no purchaser would, on or after March 6, 1979, pay value with the prospect only of having to defend a condemnation suit, running its hazards and incurring its costs.

The government responds that, though the Commission's Report and Findings states that March 6, 1979 is stipulated as the date of taking, the Commission considered the terms "date of valuation" and the "date of taking" interchangeable. The government further responds that the United States exercised no control, dominion or possession of the property in question and, in fact, K.F.I. has been and is still in possession of such property. The government reminds the Court of Instruction 19 to the Commission entered on October 3, 1977, stating that the "date of taking" must be and is fixed as of the date the government took posession of the land and denied the landowner its use and benefit. However, the question remains as to whether the government has constructively possessed the land or effectively denied the landowner the use and benefit of the land so as to constitute a taking and to entitle K.F.I. to prejudgment interest.

PREJUDGMENT INTEREST:

The Fifth Amendment to the United States Constitution recognizes the authority of the government to appropriate private property for public use; however, it is specified that such property shall not be taken for public use without just compensation. Due to Public Law 93–439, October 11, 1974, 16 U.S.C.A. § 698, establishing the Big Thicket National Preserve, there is no question but that the land involved in this case is being taken for public use and that just compensation must be awarded to Defendant K.F.I.

"Just compensation" is the fair market value at the time of the taking plus interest from that date to the date of payment. *Albrecht* v. *United States,* 329 U.S. 599, 67 S.Ct. 606, 91 L.Ed. 532 (1946). To the extent that interest is an element of just compensation, eminent domain cases are an exception to the general rule of nonliability of the sovereign for interest. This award of interest is not mere payment for delay, *Bishop* v. *United States,* 288 F.2d 525 (5th Cir. 1961); nor is it interest as it is commonly known, but rather a part of the just compensation to which the owner is entitled. *United States* v. *Thayer West Point Hotel Co.,* 329 U.S. 585, 67 S.Ct. 398, 91 L.Ed. 521 (1947); *Shoshone Tribe* v. *United States,* 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937). Thus, in defining just compensation, it is more accurate to say that where the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of taking as will produce the full equivalent of such value paid contemporaneously. *United States* v. *Klamath & Moadoc Tribes of Indians,* 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938); *United States* v. *Playa de Flor Land & Improvement Co.,* 160 F.2d 131 (5th Cir. 1947). *United States* v. *5.00 Acres of Land,* 507 F.Supp. 589, 598 (E.D.Tex.1981).

Where private property is appropriated, the right to interest or the fair equivalent attaches automatically to the right to an

award of damages. *Miller* v. *United States*, 620 F.2d 812 (Ct.Cl.1980); *Shoshone Tribe* v. *United States*, *supra*. No specific demand to include interest is necessary, nor does an award of interest depend on the existence of a specific statutory provision or a special agreement of the parties. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306, 43 S.Ct. 354, 356, 67 L.Ed. 664 (1923). It is clear from the case law that where the date of taking of the property precedes the date of payment of the award, the right to interest is directly derived from the Fifth Amendment. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738 (1951); *Bishop* v. *United States*, *supra*; *United States* v. *59.29 Acres of Land*, 495 F. Supp. 212, 214 (E.D.Tex.1980).

The purpose of awarding just compensation is to put the owner in as good a position pecuniarily as if the use of the owner's property had not been taken. *Phelps* v. *United States*, 274 U.S. 341, 344, 47 S.Ct. 611, 612, 71 L.Ed. 1083 (1927). This purpose is procedurally accomplished in a "declaration of taking" proceeding by filing a declaration of taking and depositing into the court the estimated amount of just compensation in accordance with the Declaration of Taking Act, 40 U.S.C. §§ 258a–258e. Such act allows 6% interest on the final award from the date of taking to the date of payment, but no interest on the amount previously deposited into the court. This provision minimizes the interest burden of the government in a condemnation proceeding and alleviates the hardship to the landowner and the occupant from immediate taking. *U.S.* v. *Miller*, 317 U.S. 369, 381, 63 S.Ct. 276, 283, 87 L.Ed. 336 (1943). However, where, as in the instant case, the government proceeds by "straight" condemnation, no deposit is required, the government's interest burden is not minimized, and the hardship to the land owner is not alleviated.

Though Federal Rule of Civil Procedure 71A governs the procedural aspects of this case, the rule does little to enlighten

the Court as to the award of interest. It seems to be well-settled in the case law, however, that interest is generally allowed as part of the damages, or just compensation, to which the owner is entitled when property is taken under the power of eminent domain. *Seaboard Air Line Ry. Co.* v. *United States, supra.* It seems just as clear from the case law that such interest is computed from the date of taking. *Albrecht* v. *United States, supra,* 329 U.S. at 602, 67 S.Ct. at 608. However, the date of taking in condemnation suits for the purpose of computing the interest due on the award has been variously determined as (1) the date of filing a declaration of taking; (2) the date of vesting of title; (3) the date of issuance of the summons; (4) the date of filing the oath of appraises; (5) the date of injury to the property; (6) the date of taking actual possession of the property; (7) the date of filing the condemnation commission's report; (8) the date an assessment list was filed; (9) the date a report on damages was filed; (10) the date of making demand for payment; (11) the date of confirmation of the commission's award; and other dates. *United States* v. *59.29 Acres of Land, supra,* at 214.

Despite the general rule of federal case law that interest is assessed from the date of taking, the Supreme Court has held that the federal courts should "adopt the local rule if it is a fair one." *Brown* v. *United States,* 263 U.S. 78, 87, 44 S.Ct. 92, 95, 68 L.Ed. 171 (1923). In *Brown,* the Court applied the local rule of Idaho and assessed interest from the date of the summons. A review of Texas case law reveals diverse results. In *Texarkana & F. S. Ry. Co.* v. *Brinkman,* 292 S.W. 860 (Tex.Comm'n.App. 1927), interest was computed from the date that the Special Commissioners awarded or estimated the damages. Explaining that *Brinkman* was never adopted by the Texas Supreme Court, the court in *Harris County Flood Control District* v. *King,* 221 S.W.2d 361 (Tex.Civ.App.—Galveston 1949, writ dism'd), allowed 6% interest from the date that condemnation proceedings were instituted subject to allowing the condemnor the

opportunity to prove affirmatively the value of the use of the property to the owner from such date until the condemnor gets actual possession. Though *Brinkman* and *King* have not been overruled, Texas courts have subsequently held that interest begins to accrue on the date of possession of the land by the condemnor. *Trinity River Authority of Texas* v. *Sealy & Smith Foundation*, 435, S.W.2d 864, 865 (Tex.Civ.App.—Beaumont 1968, writ ref'd); *Housing Authority of the City of Dallas* v. *Dixon*, 250 S.W.2d 636, 637 (Tex.Civ.App.—Dallas 1952, writ ref. n.r.e.).

In *United States* v. *59.29 Acres of Land*, *supra*, the "taking" question was confronted in a case which also involved land within the "Big Thicket". Despite the "date of taking" stipulation by the parties, the Court held that interest accrued from the date of the filing of the report and findings of the commission. The Court noted that under the ruling of *Gerlach Livestock Co.* v. *United States*, 76 F.Supp. 87, 97 (Ct.Cl.1948), affirmed, 339 U.S. 725, 70 S.Ct 955, 94 L.Ed. 1231 (1950), which held that the date of taking of the property "comes whenever the [plaintiff's] intent to take has been definitely asserted and it begins to carry out that intent", the taking may be said to have occurred by the date of the hearing before the condemnation commission. The Court explained:

> . . . by that time the plaintiff has definitely asserted its intent to take the property and has taken all the steps required for the taking [under Fed.R.Civ.Pro. 71A] except for payment of the award. By that date, the plaintiff is no longer able to dismiss the suit at will.

United States v. *59.29 Acres of Land*, supra, at 215. However, out of "fairness to the Plaintiff," the Court instead set the "date of the beginning of the obligation to pay interest on the award as the date of the filing of the report and findings of the commission, rather than the date of the hearing, since at the earlier date the amount of the award cannot be known by the plaintiff [and]

such amount can be known for a certainty only when the commission files its report and findings with the Court."

Although no precise rule determined when property has been taken, the question necessarily requires a weighing of private and public interests. *Agins* v. *City of Tiburon*, 447, U.S. 255, 260–61, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *United States* v. *59.29 Acres of Land, supra*, at 214. The Court should keep in mind that the Fifth Amendment's guarantee is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed. 631 (1978). The constitutional requirement of just compensation derives as much content from the basic equitable pinciples of fairness as it does from technical concepts of property law. *United States* v. *Fuller*, 409 U.S. 488, 490, 93 S.Ct. 801, 803, 35 L.Ed.2d 16 (1973); *U. S.* v. *59.29 Acres of Land, supra*. It is for this reason that the concept of "inverse" condemnation or "de facto" taking has evolved. Inverse condemnation actions fall into two broad categories: (1) those alleging that particular government-imposed land use regulations are unduly restrictive. *See, e. g., Agins* v. *City of Tiburon, supra*, and (2) those claiming that certain government activities substantially interfere with the use and enjoyment of property. *See, e. g., Griggs* v. *Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962).

In determining whether a taking has been made out, several factors are considered, including the economic impact of the regulation on the claimant, the extent to which the regulation or government activity has interfered with distinct investment backed expectations, the character of the governmental action and the nature and the extent of the interference with rights in the parcel as a whole. *Pennsylvania Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 124 & 130, 98 S.Ct. at

2659 & 2662. Although, diminution in property value, standing alone, does not establish a taking, *see Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Hadacheck* v. *Sebastion*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915), a government regulation effects a taking if the ordinance "does not substantially advance legitimate interests or denies an owner economically viable use of his land." *Agins* v. *Tiburon, supra*, 447 U.S. at 260, 100 S.Ct. at 2151. Furthermore, if the effects of governmental action are so complete as to deprive the owner of all or most of his interest in the subject matter, a taking has occurred. *United States* v. *General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914). Simply stated, property is legally taken when the condemnor's action directly interferes with or substantially disturbs the owner's use and enjoyment of his property. *Pete* v. *United States*, 531 F.2d 1018 (Ct.Cl.1976). The Uniform Eminent Domain Code §1009 states that "the compensation awarded must include an amount sufficient to compensate for loss caused by the restriction or limitation imposed by the court upon the owner's right to use the property."

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414–15, 43 S.Ct. 158, 159–160, 67 L.Ed. 322 (1922), the court found that a statute made it commercially impracticable to mine coal and, thus, had nearly the same effect as the complete destruction or rights the claimant had reserved from the owners of the surface land. In *United States* v. *Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), government activity resulted in the destruction of the use of property as a commercial chicken farm. Finding that the loss to the owner was "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it," the Court held that a taking had occurred. *Id.* at 261, 66 S.Ct. at 1065.

In the instant case, condemnation proceedings instituted by the United States government have effectively denied Defendant K.F.I. economically viable use and enjoyment of its property since it is prevented from continuing its timber buisness. It is highly doubtful that the government would permit the cutting of even one tree when the purpose of these proceedings is to preserve the land in question for public use as a wilderness park. It is unjust that the government enjoys the interest to which the owner is entitled while the owner is effectively denied the use and enjoyment of his property. Surely this is not the intent of the Fifth Amendment.

In today's inflated economic climate, interest is a realistic expectation of the owner. The Court takes judicial notice that the current legal rate of interest in the state of Texas is six percent (6%) per annum. Tex.Rev.Civ.Stat.Ann. art. 5069–1.03 (Vernon Supp. 1979); *See State of Texas* v. *Brunson*, 461 S.W.2d 681 (Tex.Civ.App.—Corpus Christi 1970, writ ref. n.r.e.). In addition to the value of the land, found by the Commission to be $2,331,202.00, interest is assessed on such amount at the legal rate of six percent (6%) per annum from the date that condemnation proceedings were instituted.

The Court notes that, had the government instituted proceedings pursuant to the Declaration of Taking Act, 40 U.S.C. §§ 258a–258e, interest would be assessed at the same rate from the date that the declaration of taking was filed. Furthermore, the amount of interest assessed from the date that proceedings were instituted is but a fraction of the amount that the government would have paid had it borrowed money on the money market in order to deposit the estimated amount of just compensation at the date of taking. The amount is also only a fraction of the benefits that the owner could have received had the money been available to him for investment purposes. With these considerations, the result in the instant case appears to be an equitable solution.

The Court recognizes that the amount of the condemnation award is not known with certainty by the plaintiff until the date that the report and findings of the Commission are filed; however, a plaintiff can minimize its interest burden by depositing estimated funds into the registry of the Court at the initiation of condemnation proceedings. In the instant case, the government chose not to take such precautions. The law has little sympathy for those who do not avail themselves of protective insurance, especially when such persons are enjoying the money of others in the meantime. Short and sweet, the government cannot "have its cake and eat it too."

EXHIBIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-2402

UNITED STATES OF AMERICA,

Plaintiff-Appellant
Cross-Appellee,

versus

2,175.86 ACRES OF LAND, More or Less, Situated in Hardin & Jefferson Counties, State of Texas, ET AL.,

Defendants,

KIRBY FOREST INDUSTRIES, INC.,

Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(MARCH 10, 1983)

Before RUBIN, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

Denied

ENTERED FOR THE COURT:

CLERK'S [illegible]

Charles Clark
United States Circuit Judge

1974 Act - Title 16 Sec. 698 - U.S. Code

§ 698. Big Thicket National Preserve--Establishment

(a) In order to assure the preservation, conservation, and protection of the natural, scenic, and recreational values of a significant portion of the Big Thicket area in the State of Texas and to provide for the enhancement and public enjoyment thereof, the Big Thicket National Preserve is hereby established.

Location; boundaries; publication in Federal Register

(b) The Big Thicket National Preserve (hereafter referred to as the "preserve") shall include the units generally depicted on the map entitled "Big Thicket National Preserve", dated November 1973 and numbered NBR-BT 91,027 which shall be on file and available for public inspection in the offices of the National Park Service, Department of the Interior, Washington, District of Columbia, and shall be filed with appropriate offices of Tyler, Hardin, Jasper, Polk, Liberty, Jefferson, and Orange Counties in the State of Texas. The Secretary of the Interior (hereafter referred to as the "Secretary") shall, as soon as practicable, but no later than six months after October 11, 1974, publish a detailed description of the boundaries of the preserve in the Federal Register. In establishing such boundaries, the Secretary shall locate stream corridor unit boundaries referenced from the stream bank on each side thereof and he shall further make every reasonable effort to exclude from the units hereafter described any improved year-round residential properties which he determines, in his discretion, are not necessary for the protection of the values of the area or for its proper administration. The preserve shall consist of the following units:

Big Sandy Creek unit, Polk County, Texas, comprising approximately fourteen thousand three hundred acres;

Menard Creek Corridor unit, Polk, Hardin, and Liberty Counties, Texas, including a module at its confluence with the Trinity River, comprising approximately three thousand three hundred and fifty-nine acres;

Hickory Creek Savannah unit, Tyler County, Texas, comprising approximately six hundred and sixty-eight acres;

Turkey Creek unit, Tyler and Hardin Counties, Texas, comprising approximately seven thousand eight hundred acres;

Beech Creek unit, Tyler County, Texas, comprising approximately four thousand eight hundred and fifty-six acres;

Upper Neches River corridor unit, Jasper, Tyler, and Hardin Counties, Texas, including the Sally Withers Addition, comprising approximately three thousand seven hundred and seventy-five acres;

Neches Bottom and Jack Gore Baygall unit, Hardin and Jasper Counties, Texas, comprising approximately thirteen thousand three hundred acres;

Lower Neches River corridor unit, Hardin, Jasper, and Orange Counties, Texas, except for a one-mile segment on the east side of the river including the site of the papermill near Evadale, comprising approximately two thousand six hundred acres;

Beaumont unit, Orange, Hardin, and Jefferson Counties, Texas, comprising approximately six thousand two hundred and eighteen acres;

Loblolly unit, Liberty County, Texas, comprising approximately five hundred and fifty acres;

Little Pine Island-Pine Island Bayou corridor unit, Hardin and Jefferson Counties, Texas, comprising approximately two thousand one hundred acres; and

Lance Rosier Unit, Hardin County, Texas, comprising approximately twenty-five thousand and twenty-four acres.

Acquisition of Land

(c) The Secretary is authorized to acquire by donation, purchase with donated or appropriated funds, transfer from any other Federal agency, or exchange, any lands, waters, or interests therein which are located within the boundaries of the preserve: Provided, That any lands owned or acquired by the State of Texas, or any of its political subdivisions, may be acquired by donation

only. After notifying the Commitees on Interior and Insular Affairs of the United States Congress, in writing, of his intention to do so and of the reasons therefor, the Secretary may, if he finds that such lands would make a significant contribution to the purposes for which the preserve was created, accept title to any lands, or interests in lands, located outside of the boundaries of the preserve which the State of Texas or its political subdivisons may acquire and offer to donate to the United States or which any private person, organization or public or private corporation may offer to donate to the United States and he may administer such lands as a part of the preserve after publishing notice to that effect in the Federal Register. Notwithstanding any other provision of law, any federally owned lands within the preserve shall, with the concurrence of the head of the administering agency, be transferred to the administrative jurisdiction of the Secretary for the purposes of sections 698 to 698e of this title, without transfer of funds.

Pub.L. 93-439, § 1, Oct. 11, 1974, 88 Stat. 1254.

§ 698a. Same--Mineral rights; easements; improved properties

(a) The Secretary shall, immediately after the publication of the boundaries of the preserve, commence negotiations for the acquisition of the lands located therein: Provided, That he shall not acquire the mineral estate in any property or existing easements for public utilities, pipelines or railroads without the consent of the owner unless, in his judgment, he first determines that such property or estate is subject to, or threatened with, uses which are, or would be, detrimental to the purposes and objectives of sections 698 to 698e of this title: Provided further, That the Secretary, insofar as is reasonably possible, may avoid the acquisition of improved properties, as defined in sections 698 to 698e of this title, and shall make every effort to minimize the acquisition of land where he finds it necessary to acquire properties containing improvements.

Plan to Committee on Interior and Insular Affairs and on Appropriations; time; contents

(b) Within one year after October 11, 1974, the Secretary shall submit, in writing, to the Committee on Interior and Insular Affairs and to the Committees on Appropriations of the United States Congress a detailed plan which shall indicate:

(i) the lands and areas which he deems essential to the protection and public enjoyment of this preserve,

(ii) the lands which he has previously acquired by purchase, donation, exchange or transfer for administration for the purpose of this preserve, and

(iii) the annual acquisition program (including the level of funding) which he recommends for the ensuing five fiscal years.

Completion of land acquisition program; time

(c) It is the express intent of the Congress tHat the Secretary should substantially complete the land acquisition program contemplated by sections 698 to 698e of this title within six years after October 11, 1974.

Pub.L. 93-439, § 2, Oct. 11, 1974, 88 Stat. 1256.

§ 698b. Same--Improved property; election of right of use and occupancy; payment of fair market value; termination of right

(a) The owner of an improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for himself and his heirs and assigns a right of use and occupancy of the improved property for non-commercial residential purposes for a definite term of not more than twenty-five years or, in lieu thereof, for a term ending at the death of the owner or the death of his spouse, whichever is later. The owner shall elect the term to be reserved. Unless this property is wholly or partially donated to the United States, the Secretary shall pay the owner the fair market value oi the property on the date of acquisition less the fair market value, on that date, of the right retained by the owner. A right retained purusant to this section shall be subject to termination by the Secretary upon his determination that it is being exercised in a manner inconsistent with the purposes of sections 698 to 698e of this title, and it shall terminate by operation of law upon the Secretary's notifying the holder of the right of sucH determination and tendering to him an amount equal to the fair market value of that portion of the right which remains unexpired.

Definitions

(b) As used in sections 698 to 698e of this title, the term "improved property" means a detached, year-round one-family dwelling which serves as the owner's permanent

place of abode at the time of acquisition, and construction of which was begun before July 1, 1973, which is used for non-commercial residential purposes, together with not to exceed three acres of land on which the dwelling is situated and together with such additional lands or interests therein as the Secretary deems to be reasonably necessary for access thereto, such lands being in the same ownership as the dwelling, together with any structures accessory to the dwelling which are situated on such land.

Waiver of right to relocation assistance by election of right of use and occupancy

(c) Whenever an Owner of property elects to retain a right of use and occupancy as provided in this section, such owner shall be deemed to have waived any benefits or rights accruing under sections 4623, 4624, 4625, and 4626 of Title 42, and for the purposes of such sections such owner shall not be considered a displaced person as defined in section 4601(6) of Title 42.

Pub.L. 93-439, § 3, Oct. 11, 1974, 88 Stat. 1256, amended Pub.L. 94-578, Title III, § 322, Oct. 21, 1976, 90 Stat. 2742.

§ 698c. Same--Administration; applicability of other laws

(a) The area within the boudaries depicted on the map referred to in section 698 of this title shall be known as the Big Thicket National Preserve. Such lands shall be administered by the Secretary as a unit of the National Park System in a manner which will assure their natural and ecological integrity in perpetuity in accordance with the provisions of sections 698 to 698e of this title and with the provisions of sections 1 and 2 to 4 of this title, as amended and supplemented.

Limitation on construction of roads, campgrounds, etc.; rules and regulations for use of Federal lands and waters

(b) In the interest of maintaining the ecological integrity of the preserve, the Secretary shall limit the construction of roads, vehicular campgrounds, employee housing, and other public use and administrative facilities and he shall promulgate and publish such rules and regulations in the Federal Register as he deems necessary and appropriate to limit and control the use of, and activities on, Federal lands and waters with respect to:

(1) motarized land and water vehicles;

(2) exploration for, and extraction of, oil, gas, and other minerals;

(3) new construction of any kind;

(4) grazing and agriculture; and

(5) such other uses as the Secretary determines must be limited or controlled in order to carryout the purposes of sections 698 to 698e of this title.

(c) The Secretary shall permit hunting, fishing, and trapping on lands and waters under his jurisdiction within the preserve in accordance with the applicable laws of the United States and the State of Texas, except that he may designate zones where and periods when, no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection and management, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions relating to hunting, fishing, or trapping shall be put into effect only after consultation with the appropriate State agency having jurisdiction over hunting, fishing, and trapping activities.

Pub.L. 93-439, § 4, Oct. 11, 1974, 88 Stat. 1257.

§ 698d. Same preservation as wilderness; review of area by Secretary; report to President; time

Within five years from October 11, 1974, the Secretary shall review thearea within the preserve and shall report to the President, in accordance with section 1132(c) and (d) of this title, his recommendations as to the suitability or nonsuitability of any area within the preserve for preservation as wilderness, and any designation of any such areas as a wilderness shall be accomplished in accordance with section 1132(c) and (d) of this title.

Pub.L. 93-439, § 5, Oct. 11, 1974, 88 Stat. 1257.

§ 698e. Same; authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 698 to 698e of this title, but not to exceed $63,812,000 for the acquisition of lands and interests in lands and not to exceed $7,000,000 for development.

Pub.L. 93-439, §6, Oct. 11, 1974, 88 Stat. 1257.

Legislative History. For legislative 1974 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 93-439, see 5554.

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 671 F.2d 336. The opinions of the district court (App. C and D, *infra*, 15a-19a) are unreported.

The judgment of the court of appeals was entered on March 12, 1982, and rehearing was denied on June 1, 1982 (App. B, *infra*, 13a-14a). On August

18, 1982, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

40 U.S.C. 257 provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. 258a provides in pertinent part:

> In any proceeding in any court of the United States * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.
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> * * * * *
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the per-

sons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

STATEMENT

1. Two types of condemnation are provided for by statute: under the Declaration of Taking Act, 40 U.S.C. 258a, the government may obtain title and possession immediately by filing a declaration of taking and depositing with the court the estimated amount of just compensation. If the judicially determined amount of just compensation is greater than the amount deposited, the government must pay the difference with interest from the date the declaration of taking is filed; no interest is due on the amount originally deposited. The alternative condemnation method, "straight condemnation," is initiated by filing a complaint in condemnation pursuant to 40 U.S.C. 257. The government makes no deposit with the court, and the landowner retains possession and title until the judicial proceedings have been completed and the government has paid the judgment awarded.

This case raises the question of when interest begins to accrue in a straight condemnation case.

2. On July 12, 1976, the United States filed a complaint pursuant to 40 U.S.C. 257 to condemn property located in Marin County, California, for inclusion in the Golden Gate National Recreation Area.[1] Beginning on June 20, 1977, a jury trial was held to determine the amount of just compensation to be paid for the interest condemned by the United States. On July 14, 1977, the jury reached a verdict of $3,799,400. On November 9, 1977, final judgment was entered in favor of the landowners in that amount.

On November 17, 1977, the United States moved for a new trial, or, in the alternative, for remittitur, followed by extensive briefing by the parties. The motion was denied by the district court on June 20, 1978, and, on August 11, 1978, the United States filed a notice of appeal; the landowners then cross-appealed. By stipulation of all parties, the appeals were withdrawn on October 30, 1978.

On November 17, 1978, the Assistant United States Attorney deposited the full amount of the award with the clerk of the court in satisfaction of the judgment. Ten days later, the government deposited an additional $239,802.90, representing interest at the rate of 6% on the judgment for the year between the entry of final judgment and the payment of that judgment. Distribution of the additional deposit was made subject to a further order of the court. On March 5, 1979, the United States filed

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[1] The Act of Oct. 27, 1972, Pub. L. No. 92-589, 86 Stat. 1299, 16 U.S.C. 460bb *et seq.*, established the Golden Gate National Recreation Area and authorized acquisition of lands within its boundaries by the Secretary of the Interior.

a motion for an order to disallow interest on the judgment.

3. On June 21, 1979, the district court granted the government's motion and issued an order disallowing interest on the judgment (App. C, *infra*, 15a-17a). Relying on the established principle that "interest is allowable only from the time of the 'taking' to the date of the payment of the award," see, e.g., *Danforth* v. *United States*, 308 U.S. 271 (1939), the court found that the United States had not exercised "control and dominion" over the land prior to payment of the judgment (App. C, *infra*, 17a). In its order denying the landowners' motion for reconsideration, the court found no support in the record for the landowners' claim that "the land had increased in value during the time that elapsed from the entry [of verdict] until the Government's taking" (App. D, *infra*, 19a).

4. The United States Court of Appeals for the Ninth Circuit reversed, Judge Wallace dissenting. The court held that interest running from the judgment date should be allowed. Recognizing that "[w]here the property is income-producing, the condemnation judgment is not a taking" (App. A, *infra*, 7a), the court distinguished this situation, where the land was undeveloped, and hence producing no current economic benefits for the owners. In that situation, the court reasoned, the existence of the judgment in condemnation produced a "cloud on the title" that precluded the development or sale of the land, and thus "denied the landowners any economically viable use of their land" (App. A, *infra*, 8a). Accordingly, the panel majority concluded that the date of taking of undeveloped land is the date of judgment, mandating the award of post-judgment interest (*ibid.*).

Judge Wallace dissented, relying on "the long-standing rule that absent a taking by physical possession or by statutory provision, no taking occurs until payment of the condemnation award." App. A, *infra*, 9a. He could see no reason for drawing a constitutional distinction between the owner of unimproved and improved property in these circumstances; both are in the same situation as owners whose ability to sell or develop their land is thwarted by publicly announced government plans to condemn property (App. A, *infra*, 11a). All alike suffer economic burdens that are significantly less than "the kinds of substantial deprivations which have heretofore been recognized as constitutional 'takings'" (App. A, *infra*, 11a-12a). Judge Wallace concluded that any change in the rules applicable to unimproved property should "come from Congress rather than the federal courts" (App. A, *infra*, 12a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring[2] question concerning the government's obligation to

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[2] The courts that have recently considered the issue have selected various points in the straight condemnation process for the beginning of the accrual of interest. The issue is currently pending in the Court of Appeals for the Fifth Circuit. *United States* v. *2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries*, 5th Circuit No. 81-2402. The district court in *Kirby Forest Industries*, 520 F. Supp. 75 (E.D. Tex. 1981), awarded interest from the date the complaint was filed, some seven months before trial. See also *United States* v. *59.29 Acres of Land in Hardin County, Texas*, 495 F. Supp. 212 (E.D. Tex. 1980) (interest due from the date of the filing of the report and findings of the Commission appointed pursuant to Fed. R. Civ. P. 71A to determine just compensation); *United States* v. *Cer-*

pay interest in straight condemnation cases. The court of appeals' resolution of that question is inconsistent with this Court's decision in *Danforth* v. *United States*, 308 U.S. 271 (1939), and its more recent just compensation cases. In addition, it will be difficult for condemnation courts to apply, and will substantially increase condemnation costs while unfairly discriminating between owners of developed and undeveloped land. A landowner suffering injustices as a result of delays in the payment of a straight condemnation award has alternative remedies free from these disadvantages.

1. Although the potential financial impact on the government of the decision below cannot be predicted with any accuracy, it is bound to be large. As of September 1982, pending cases filed under 40 U.S.C. 257 involve more than 6,000 tracts of land, valued by the government at more than $100 million. The landowners' valuations are, of course, much higher. Most of these condemnations are for the use of the Park Service, and thus presumably involve unimproved land. Assuming that only half of the land involved is determined to be non-income producing, and that there is on the average only 6 months of interest awarded and only at 6% straight interest, the total extra interest obligation under the analysis of the court below would still be about one and a half million dollars for currently pending cases alone. The

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tain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, Nos. 68-208C *et al.* (D. Mass. May 28, 1982) (same); *United States* v. *15.65 Acres of Land in the County of Marin, State of California*, Nos. 81-4062 & 81-4101 (9th Cir. May 25, 1982, rehearing denied, Sept. 10, 1982) (interest due from stipulated date of valuation, more than a year before trial).

actual figure would doubtless be substantially in excess of that estimate.

Congressional appropriations to finance these condemnations have been based on the long-standing assumption, recognized by the dissent below (App. A, *infra*, 9a), that in straight condemnation cases where the government has not entered into possession, the date of taking is the date that the government pays the condemnation award,[3] so that no interest is due. In carving out an exception to this general rule for non-income producing land, the court below imposed an unanticipated increase in the cost of acquiring such land, thereby reducing the agencies' abilities to implement congressional directives.

2. In *Danforth* v. *United States*, *supra*, 308 U.S. at 284, this Court concluded that "[u]nless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit * * * takes place upon the payment of the money award by the condemnor. No interest is due upon the award." (Footnote omitted). In concluding that there has "in actuality" been a previous taking when unimproved lands are involved,[4] the court below overlooked the

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[3] Cf. S. Rep. No. 1597, 90th Cong., 2d Sess. 5 (1968), directing the Park Service to utilize straight condemnation proceedings to preserve the option to reconsider, after judgment award fixes cost of acquisition. The option is important: "[t]he cost of public projects is a relevant element * * *, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost," *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1946).

[4] If the government were to enter into possession of the land before the payment of just compensation, that would effectuate a taking "in actuality", which would require that

analysis upon which the *Danforth* conclusion was based:

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. (Footnotes omitted.) *Ibid.*

The argument adopted by the court below that the land was taken when the condemnation judgment denied the landowners "any economically viable use" of their property (App. A, *infra*, 6a) is the same as the claim of the *Danforth* landowner that the government "took" a flowage easement in his farmland[5] either when Congress passed the Flood Control Act that authorized the condemnation or when the government built levees as part of the project, because these actions had, as a practical matter, reduced his ability to use or sell his land. This Court rejected that claim, holding that this reduction in the value of the land, like other changes in value that are incidents of ownership, "cannot be considered as a 'taking' in the constitutional sense" (308 U.S. at 285). There is no suggestion that the size of the change in

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interest be paid to compensate the landowner for the delay in payment. *United States* v. *Dow*, 357 U.S. 17, 24 (1958). In the instant case, however, the district court specifically found that the government had not exercised control and dominion over the land until after it deposited the amount of the verdict in the registry of the court (App. C, *infra*, 17a).

[5] See Brief for William H. Danforth, Petitioner, No. 309, 1939 Term at 4.

value, or a complete inability to sell the land, would have affected the Court's reasoning.[6]

This Court has recently reiterated the teaching of *Danforth*, in again rejecting the claim that the pendency of condemnation proceedings constitutes a constitutional taking of property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 263 n.9. ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, * * * cannot be considered as a 'taking' in the constitutional sense"). Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (no taking where statute forbids sale of property).

3. The court of appeals' distinction between "vacant, unimproved land" and income-producing land (App. A, *infra*, 6a-7a) does not withstand analysis. First, vacant, unimproved land may be income producing, for instance if it is used for grazing or timbering (See, e.g., *Kirby Forest Industries*, *supra*, where the district court, using an analysis like that of the court below, concluded that a timber lot was unimproved, and thus not income producing). And, of course, improved land may be difficult, or even impossible, to rent or to use at a profit for all or part of the time the condemnation suit is pending. It is not clear how the court of appeals would treat such situations.[7] Perhaps more seriously, the distinc-

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[6] Indeed, the Court quoted (308 U.S. at 285, n.20) the reference in *Brown* v. *United States*, 263 U.S. 78, 85-86 (1923) to "the presumption * * * that the valuation included the practical damage arising from the *inability* to sell or lease after the blight of the summons to condemn [emphasis added]."

[7] The same classification problem arises if the land is largely unproductive, but has a few improvements that do produce

tion assumes that unimproved land is necessarily held for speculative purposes, while improved land is not. But improved land may well be held with the intention of upgrading its use, and unimproved land may be held without any intention of deriving any present economic benefit from it. As the dissent below recognized (App. A, *infra*, 9a-12a), there is no reason why only the speculative interests of unimproved landowners merit protection.[8]

The difficulty is not resolved by requiring the court to evaluate the particular motivations of all owners of condemned land, whether income producing or not. A major advantage of the fair market value standard of valuation is to avoid requiring the condemnation court to consider such particular values of the individual tract to the landowner. See, e.g., 1 L. Orgel, *Valuation Under the Law of Eminent Domain*, §§ 14, 74-76 (2d ed. 1953).

4. Fairness does not require the award of interest to the landowner who remains in possession for the period between the entry of judgment and the vesting of title on the payment of that judgment. In *Dan-*

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some income. See, e.g., *United States* v. *Holden*, 268 F. Cas. 223, 224 (N.D.N.Y. 1920) (large tract of land; "for the most part it is a swamp and unproductive", but contains two buildings rented for $25 a month).

[8] Indeed, to the extent that interest is designed to compensate the landowner for the loss of the use of the property between the date of the taking and the payment of the award, the owner of non-productive land—who had no current income from the land before the taking, and thus lost nothing that he previously enjoyed—has a less worthy claim to interest than an owner of income producing property whose ability to continue to gain a return on his land is diminished by the pendency of the proceeding. Cf. *United States* v. *Holden*, *supra*, 268 F. Cas. at 224.

forth, supra, this Court recognized the justice of permitting the government a reasonable time to decide whether to acquire the property, once its cost has been established. See also *Tiburon, supra,* 447 U.S. at 263, n.9.[9] If that decision is unreasonably delayed, the landowner may move for dismissal pursuant to Fed. R. Civ. P. 71A(i)(3). In the absence of such a motion, it is reasonable to assume that the landowner does not object to the delay in the payment of the judgment, because he prefers to retain possession of his land, for economic or non-economic reasons.

If the landowner does move for dismissal, he is free at the hearing on the motion to present adequate evidence of any increase in value of the property in the interim in order to demonstrate the inequity of permitting the government to recover on the stale judgment. Cf. *United States* v. *Clarke,* 445 U.S. 253, 258 (1980).

Where, as here, no such evidence has been presented by the landowner [10] the district court correctly refused to assume that the land had increased in value (App. D, *infra,* 16a-17a).[11] Accord, *Gould* v. *United States,* 301 F.2d 557, 560 (D.C. Cir. 1962). In this situation, it is surely reasonable to treat the

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[9] If the government abandons the proceedings, it generally becomes liable to pay the condemnee reasonable attorneys' fees and other litigation expenses. (42 U.S.C. 4654(a)(2)).

[10] The landowner bears the burden of proving the value of the land. *United States ex rel. TVA* v. *Powelson,* 319 U.S. 266, 273 (1943).

[11] Indeed, as the district court noted (App. C, *infra,* 17a), the record evidence indicating "the uniqueness of this land and the particular problems that its development would entail" made reliance on any general escalation in real estate prices particularly inappropriate here.

condemnation transaction like the usual commercial transaction—when payment is received at the time that title and possession of the goods are transferred, no interest is due.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
CAROL E. DINKINS
Assistant Attorney General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
RAYMOND N. ZAGONE
JACQUES B. GELIN
CLAIRE L. MCGUIRE
Attorneys

SEPTEMBER 1982

NO. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

JOE G. ROADY, ESQ.
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(713) 658-8881
Counsel for Petitioner

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Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondent

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

Petition For Certiorari Filed June 7, 1983

Certiorari Granted October 17, 1983

INDEX TO JOINT APPENDIX*

* The decisions by the District Court and the United States Court of Appeals for the Fifth Circuit have been printed in the Petition For Writ of Certiorari, Appendices B and A, respectively.

DISTRICT COURT DOCKET ENTRIES

PROCEEDINGS

8-21-78	NOTICE OF CONDEMNATION
8-21-78	COMPLAINT IN CONDEMNATION
8-21-78	ISSUED Notice of Condemnation and handed to U. S. Marshal the following NAMES:
9-18-78	Kirby Forest Industries, Inc. (s/9-11-78) $3.24
	* * *
8-30-78	NOTICE OF LIS PENDENS, a suit was instituted on August 21, 1978.
9-21-78	ANSWER OF KIRBY FOREST INDUSTRIES, INC.
	* * *
10-30-78	ORDER Setting Matters for Trial and Supplemental Instructions, Jack B. Osborne, Chairman, Condemnation Commission, Original Order in File B-78-589-CA-MF-1525-57. V.89, P.124
	* * *
3-03-80	REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION wherein it is the opinion of the Commission that the highest and best use of this land falls into a number of categories. A portion of this land, as above discussed, is best used for the production of timber, a portion is best usable for subdivision/sand pit, a portion

for recreational use, and water front development. The Commission finds that the entire tract of 2,518.57 acres, on the date of taking, was worth $2,929,702.00. The 342.71 acres in the remainder is worth $598,500.00 leaving the value of the taking at $2,311,202.00. Copy to attys. of record 3-6-80 (Signed Jack B. Osborne, Chairman, Land Commission, Smythe Shepherd and John H. Blackwell) V.98, P.238

* * *

7-28-81 MEMORANDUM OPINION—by Judge Robert M. Parker.

8-13-81 JUDGMENT ON THE REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION—It is Ordered that the just compensation for the above tracts is the sum of $2,331,202.00 plus interest at the rate of six per cent (6%) per annum from August 21, 1981 to the date of deposit. The United States shall deposit in the registry of Court the sum of $2,331,202.00 together with interest at the rate of six per cent (6%) per annum from August 21, 1978 to the date of deposit. S/8-12-81 RMP Certified copy to attorneys of record. Vol. 111, Pg. 136

10-08-81 NOTICE OF APPEAL—by Pltff cc U.S. Court of Appeals, Fifth Circuit and attorney of record.

10-09-81 NOTICE OF APPEAL—by Deft Kirby Forest Industries, Inc., certified copy mailed to U.S. Court of Appeals, Fifth Circuit and attorneys of record.

* * *

3-30-82 JUDGMENT—It is Ordered that the Clerk will issue his check, payable to Kirby Forest Industries, Inc., in the amount of $2,825,-508.06 and deliver to Curtis Willie, Director of Administration, Kirby Forest Industries, Inc. That the sum of $10,000.00 representing escrow funds for disputed taxes claimed to be payable to Jefferson County Tax Collector, City of Beaumont Tax Collector, Beaumont Independent School District, Hardin County Tax Collector, and Lumberton Independent School District Tax Collector, shall remain on deposit in the registry of the Court. The payments herein ordered are subject to adjustments as may be ordered pursuant to appeals now pending in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, La. That Title in and to the estate condemned is this proceeding is vested in the United States of America. S/3-30-82 RMP Certified copy to attorneys of Record Vol. 115, Pg. 232

* * *

4- 1-82 **DISBURSED Per Judgment 3-30-82 $2,825,508.06 ck #26,472 Kirby Forest Industries, Inc.**

* * *

3-26-82 CERTIFICATE OF CLERK—deposited in the registry of the court the sum of $2,835,-508.06. represented by U.S. Treasury Check No. 178,726, 178,727 and 178,728 dated March 26, 1982.

* * *

2-22-83 ORDER, Fifth Circuit: It is Ordered that the judgment of this Court of January 24, 1983 is hereby amended by striking therefrom the paragraph taxing costs on appeal. Each party will bear their own costs. CC to attys.

3-30-83 JUDGMENT of Fifth Circuit, It is Ordered that the judgment of the District Court in this cause be and is hereby reversed in part and that this cause be and the same is hereby remanded to the District Court in accordance with the opinion of this Court. It is Ordered that defendants-appellees pay Plaintiff-appellant the costs of appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION B-78-598-CA-MF-1525-54

TRACT NOS.: 189-09, 189-15, 189-18, 190-02, 190-05, 191-02, 191-05

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

2,175.86 ACRES OF LAND, MORE OR LESS, SITUATE IN HARDIN AND JEFFERSON COUNTIES, TEXAS, AND KIRBY FOREST INDUSTRIES, INC., AND UNKNOWN OWNERS, Defendants.

(Filed August 21, 1978)

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America for the taking of property, under its power of eminent domain, and for the ascertainment and award of just compensation to the parties in interest.

2. The public uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" annexed hereto and made a part hereof.

3. The property to be taken, the estate to be taken, and the names and addresses of the persons having or claiming an interest in said property are described in Schedule "B" annexed hereto and made a part hereof.

4. Local and State taxing authorities may have or claim an interest in the property by reason of taxes and assessments due and exigible.

5. There are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to this action under the designation "Unknown Owners."

WHEREFORE, plaintiff demands judgment that the property be condemned, that just compensation for the taking be ascertained and awarded, that such other relief as may be lawful and proper be granted.

JOHN H. HANNAH, JR.
United States Attorney

By: HAL B. CAMERON, JR.
Hal B. Cameron, Jr.
Assistant U. S. Attorney

(Exhibits Omitted in Printing)

NOTICE OF LIS PENDENS

(Title Omitted in Printing)

(Filed August 30, 1978)

TO ALL WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN that on August 21, 1978, a suit was instituted in the above-named Court, which is a condemnation proceeding, in which the above-named plaintiff and defendants are parties, defendants being more particularly named on attachment hereto; that the property involved in said suit is real estate situate in Hardin and Jefferson Counties, Texas, more particularly described on attachment hereto; and that the estate plaintiff seeks to acquire by condemnation is more particularly described on attachment hereto.

DATED at Tyler, Texas, this 24th day of August, 1978.

JOHN H. HANNAH, JR.
United States Attorney

By: /s/ HAL B. CAMERON, JR.
Hal B. Cameron, Jr.
Assistant U. S. Attorney

P. O. Box 1049
Tyler, Texas 75701

(Exhibits Omitted in Printing)

NOTICE OF TRIAL SETTING

(Title Omitted in Printing)

(Filed January 15, 1979)

Compensation for the tract(s) in the above numbered matter will be heard by the Commission commencing at 9:00 a.m. on February 13, 1979, in the Magistrate's Courtroom in the Federal Building in Beaumont, Texas.

The parties or their attorneys are directed to submit a Pre-trial Order to me, Jack B. Osborne, Chairman of the Land Commission, 1218 San Jacinto Building, Beaumont, Texas 77701, on January 30, 1979, and to exchange comparable sales information by placing same properly addressed, in the mail on February 2, 1979. Each side is limited to five comparable sales per tract, unless objection to this limitation is made known to the Commissioners at the time of the Pre-trial hearing. If it appears to the Commissioners that in certain instances this limitation would be unreasonable, an exception will be granted. The form for exchanging sales data is as follows:

Grantor:
Grantee:
Date:
Area:
Consideration:
Price Per Acre or Lot:
Instrument:
Recorded:
Survey:

The parties will at the same time provide the names, addresses and qualifications of their respective expert witnesses. Each side is limited to two expert witnesses per tract unless good cause is shown for exceeding this number.

In the event that the Pre-trial Order has been agreed to by both parties and in the event that after examination by the Commission the Pre-trial Order appears to be in proper order, it will not be necessary to have a formal Pre-trial. On the other hand, if agreement is not reached or if the Pre-trial Order received is not acceptable, there will be a Pre-trial on February 5, 1979, at 9:00 a.m. The parties or their attorneys are to have prepared jointly a Pre-trial Order containing the following:

1. Legal description of property acquired and estate taken.
2. The date of taking.
3. A summary of the location of the property and in partial takings, the number of acres in the parent and remainder tract.
4. (a) List of expert witnesses together with their written qualifications.

   (b) Names and addresses of any other witnesses, including the defendants who will testify.
5. Lists of the comparable sales information previously exchanged.

/s/ JACK B. OSBORNE
Jack B. Osborne
Chairman, Land Commission

(Notice of Service of Trial Setting Omitted in Printing)

DISTRICT COURT PRE-TRIAL ORDER

(Title Omitted in Printing)

(Filed February 15, 1979)

This is an action in condemnation under the powers of eminent domain and the jurisdiction of the Court is invoked under 28 U.S.C. Section 1358. The jurisdiction of the Court is not disputed.

The matter having been referred by the Court to a Commission, in accordance with the instructions of the Commission as set forth in the Notice of Trial Setting, there are attached hereto the following:

1. Statements of uncontested issue by tract, including

   a) Legal description and estate taken

   b) Date of taking

   c) A summary of the location of the property and in partial takings the number of acres in the parent and remainder tracts.

2. Lists of Expert Witnesses of each party together with their written qualifications.

3. Names and addresses of any other witnesses including the Defendants who will testify.

4. Lists of the comparable sales information previously exchanged.

* * *

vate his land, and, therefore, the neighbor's profit would be less while the fair cash market value of the two neighboring tracts of land might be approximately the same.

(18) You are further instructed that the price paid by the Government, or any other political subdivision with the right to eminent domain, for property similar to that being condemned is inadmissible and is not to be considered for any purpose.

(19) The "date of taking" must be and is fixed as of the date the Government took possession of the land and denied the landowner its use and benefit. In some instances, the Government obtains an order of immediate possession and takes title to the land, but the owner is permitted to continue to use the land until the end of the year, gathering and marketing his crops, etc., but in those instances the value must be fixed at the time the Government took it, and not at the time the property was abandoned by the landowner.

(20) The just compensation is the fair cash market value of the land, or interest therein, taken (whether fee simple title or otherwise). By fair cash market value is meant the amount of cash money the land, or interest therein, taken would bring in the open market at the time of the taking, or the time the Government became definitely committed to the project, when sold by a person desirous and willing to sell, but not obliged to sell for any particular purpose, and bought by a person able to and desirous of buying, but not obliged to buy for any particular purpose, allowing a reasonable time for negotiations, and taking into consideration all of the uses to which it is reasonably adaptable, and for which

it either is or in all reasonable probability would have become available within the reasonably near future, but for the taking by the Government. Just compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his

* * *

(29) Since it would be impossible for any person other than a member of the Commission to determine what evidence was considered and the weight given to the testimony of the witnesses heard, the Commission will make its own determination and findings.

(30) In making your award you will make your findings of fact and such other findings as are necessary to support your findings of just compensation. Your findings should be sufficiently comprehensive and pertinent to the issues to provide a basis for decision and must be supported by evidence. In this connection the Commission should include in its findings, among other things, (a) the highest and best use of the property on the date of taking but before the acquisition by the Government; (b) the highest and best use of the remainder which was owned by the landowner on the date of taking but after the Government acquired its interest; (c) the estates taken by the Government and the acreage contained in the various tracts condemned; (d) the effect upon any remainder, whether it is damaged or enhanced by virtue of the Government's taking, and the weight given to the testimony of the various witnesses with respect to conflicts therein; (e) the approach to evaluations that the

Commission considered most applicable, such as market data, income, or reproduction; (f) the tracts of land considered by the Commission as comparable for the purpose of establishing a market data approach; (g) the fair cash market value of the entire tract on the date of its taking as it existed before the taking; (h) the value of any remainder after the acquisition by the Government, including any damages or increment as the case may be by virtue of the taking and the project; (i) the fair market value of any outstanding interest owned by third persons, such as gravel lease, mineral lease, or grazing lease, etc.; and (j) a description of the location, topography and accessibility of the subject

* * *

TRIAL PROCEEDINGS

(Title Omitted in Printing)

(Filed July 16, 1979)

BE IT REMEMBERED that on the 6th day of March, 1979, before the Land Commission of the United States, in the offices and courtroom of the United States Magistrate, at Beaumont, Texas, the following proceedings were had in the above styled and numbered cause:

APPEARANCES:

REPRESENTING THE LAND COMMISSION:

HON. JACK B. OSBORNE, CHAIRMAN
Attorney at Law
San Jacinto Building
Beaumont, Texas 77701

HON. JOHN BLACKWELL
Corporate Drive
Beaumont, Texas 77706

HON. W. SMYTHE SHEPHERD
720 - 20th Street
Beaumont, Texas 77706

REPRESENTING THE UNITED STATES GOVERNMENT:

HON. HARRY McKEE
Special Assistant to the U. S. Attorney
Jack Brooks Building
Beaumont, Texas 77701

REPRESENTING THE LANDOWNER:

HON. JOYCE COX
Cox, Pakenham & Roady
2500 Two Shell Plaza
Houston, Texas 77002

HON. ROBBIN R. DAWSON
Cox, Pakenham & Roady
2500 Two Shell Plaza
Houston, Texas 77002

[i]

INDEX

* * *

[3]

MR. McKEE: The property—it's my understanding that we are going to be treating all of these tracts of land as one unit for the purposes of this trial.

MR. OSBORNE: That was my understanding, too.

MR. McKEE: The total acreage would be 2,518.57 acres in the before position. The Government is acquiring 2,275.93—excuse me—.86 acres, leaving a remainder of 342.71 acres, and the date of taking will be the date of trial.

MR. OSBORNE: What stipulations do we have? Number one, we're stipulating now, today is the date of taking?

MR. McKEE: Yes, sir.

MR. COX: Yes, sir.

MR. OSBORNE: Okay. We are—There is no problem, is there, with the Government's authority to take?

MR. DAWSON: No, sir.

MR. OSBORNE: Okay. Is there any problem with the power of this Commission to hear this case?

MR. DAWSON: No, sir.

* * *

REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION

(Title Omitted in Printing)

(Filed March 3, 1980)

Authority of Commission:

(1) Federal Rule of Civil Procedure 71A, as Amended, and

(2) Order of Court Appointing Commission, entered September 8, 1977, and October 3, 1977, and

(3) General Instructions of the Court.

Date of Hearing:

March 6, 7, 8, 9, 19 and 20, 1979.

Counsel for Government:

Harry W. McKee, Special Assistant U. S. Attorney.

Witnesses for Government:

Robert Dobbs Dillman, Expert in Air Photo Interpretation, Houston, Texas.

James K. Norwood, Expert Real Estate Appraiser, Fort Worth, Texas.

F. E. Willcox, Jr., Expert in Soil Mechanics and Engineering.

J. T. Roach, Expert Timber Buyer, Maydelle, Texas.

Defendant Landowner:

Kirby Forest Industries, Inc.

Counsel for Landowner:

Joyce Cox, Attorney at Law, Houston, Texas.

Robbin H. Dawson, Attorney at Law, Houston, Texas.

Witnesses for Landowner:

George Stanley, Senior Vice President, Kirby Forest Industries, Inc.

Thomas Newman, Expert Timber Appraiser, Birmingham, Alabama.

Frank R. Grote, Expert Timber Appraiser, Silsbee, Texas.

Azar B. Bean, Expert Timber Buyer, Kirbyville, Texas.

Glen Dixon, Real Estate Developer, Victoria, Texas.

Willard J. Hall, Expert Real Estate Appraiser, Beaumont, Texas.

Stipulations:

(1) Date of Taking: March 6, 1979.

(2) Total Acreage in Tract: 2,518.57 acres. The remainder is 342.71 acres and the part taken is 2,175.86 acres.

(3) Plaintiff has the authority to take this property.

(4) This Commission has the authority to hear this matter.

(5) That Tract 189-09 be resurveyed and remapped so that it runs and meanders with, about 25 feet west of the center line of a road which is marked in red on an exhibit in the north end of the Tract.

(6) The estate acquired was the fee simple title, however, excepting and excluding from the taking all oil, gas, and other minerals in and under said land.

Record of Proceedings:

A competent reporter was present throughout the hearing and a transcript can be obtained. All exhibits have been filed with the U. S. District Clerk.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION B-78-598-CA-MF-1525-54

TRACT NOS.: 189-09, 189-15, 189-18, 190-02, 190-05, 191-02, 191-05

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

2,175.86 ACRES OF LAND, MORE OR LESS, SITUATE IN HARDIN AND JEFFERSON COUNTIES, TEXAS, AND KIRBY FOREST INDUSTRIES, INC., AND UNKNOWN OWNERS, Defendants.

(Filed August 13, 1981)

JUDGMENT ON THE REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION

ON THE 6th day of March, 1979, came on for hearing before a commission appointed by the Court the issue of just compensation for the condemnation of the estate in and to Tract No. 189-09, 189-15, 189-18, 190-02, 190-05, 191-02 and 191-05, as said estate and tracts are described in the Complaint in Condemnation filed in this cause. The Report and Findings of the Condemnation Commission was filed on March 3, 1980, awarding just compensation, and the Court after considering said Report, accepts the findings of the fact incorporated in said Report and Findings of the Condemnation Commission

in the above-entitled civil action, and it appearing to the Court that such Report should be approved, in that such findings of fact were supported by substantial evidence, and there was no substantial error or misapplication of controlling law in the proceedings of the Commissioners, accordingly, it is ORDERED that the findings of fact incorporated in such Report be and they are hereby adopted and it is further ORDERED that the Report and Findings of the Condemnation Commission be and it is hereby ACCEPTED and APPROVED by this Court. The Court being fully advised in the premises, further finds:

The said Complaint was duly filed and that all proper process and notice required by law were given the said owners named as Defendants herein:

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court:

1. That the just compensation for the condemnation of the estate in and to Tract Nos. 189-09, 189-15, 189-18, 190-02, 190-05, 191-02 and 191-05 as said estate is described in the Complaint in Condemnation on file herein is $2,331,202.00 plus interest at the rate of six per cent (6%) per annum from August 21, 1978, to the date of deposit.

2. That the United States shall deposit into the Registry of the Court the sum of $2,331,202.00 together with interest at the rate of six per cent (6%) per annum from August 21, 1978, to the date of said deposit.

SIGNED and ENTERED this the 12th day of August, 1981.

/s/ ROBERT M. PARKER
United States District Judge

Consented to as to form only:

/s/ JOYCE COX
Joyce Cox
Attorney for the Defendant

/s/ HARRY W McKEE
Harry W. McKee
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION B-78-598-CA-MF-1525-54

TRACT NOS.: 189-09, 189-15, 189-18, 190-02, 190-05, 191-02, 191-05

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

2,175.86 ACRES OF LAND, MORE OR LESS, SITUATE IN HARDIN AND JEFFERSON COUNTIES, TEXAS, AND KIRBY FOREST INDUSTRIES, INC., AND UNKNOWN OWNERS, Defendants.

(Filed March 30, 1982)

JUDGMENT

ON THIS DAY came on to be considered the deposit of funds by plaintiff as previously ordered and the Application for Distribution of Funds as to Tract No. 189-09, 189-15, 189-18, 190-02, 190-05, 191-02, and 191-05, and the Court being fully advised in the premises, finds:

That the proceedings have been conducted according to law;

That this Court has jurisdiction of the parties and subject matter;

That plaintiff has deposited funds in the amount of $2,835,508.06 as ordered by Judgment on Report and Findings of the Condemnation Commission.

It is, therefore, ORDERED, ADJUDGED, and DECREED by the Court:

1. That the Clerk will issue his check, payable to Kirby Forest Industries, Inc., in the amount of $2,825,508.06, and deliver to Curtis Willie, Director of Administration, Kirby Forest Industries, Inc.

2. That the sum of $10,000.00, representing escrow funds for disputed taxes claimed to be payable to Jefferson County Tax Collector, City of Beaumont Tax Collector, Beaumont Independent School District Tax Collector, Hardin County Tax Collector, and Lumberton Independent School District Tax Collector, shall remain on deposit in the registry of the court.

3. The payments herein ordered are subject to adjustment as may be ordered pursuant to appeals now pending in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and all action by Courts with jurisdiction in future related proceedings; and any overpayment or underpayment as determined in said proceedings shall be taken into the final accounting in this cause.

4. That all defendants named in this action as to the above mentioned tracts, except the persons named above, take nothing by reason of this suit.

5. That title in and to the estate condemned in this proceeding is vested in the United States of America.

SIGNED and ENTERED this the 30th day of March, 1982.

/s/ ROBERT M. PARKER
United States District Judge

APPROVED AS TO FORM ONLY:

/s/ JOYCE COX
Joyce Cox
Attorney for Kirby Forest Industries, Inc.

/s/ HARRY W. McKEE
Harry W. McKee
Attorney for United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION B-78-598-CA-MF-1525-54

TRACT NOS.: 189-09, 189-15, 189-18, 190-02, 190-05, 191-02, 191-05

(Big Thicket National Preserve)

UNITED STATES OF AMERICA, Plaintiff,

v.

2,175.86 ACRES OF LAND, MORE OR LESS, SITUATE IN HARDIN AND JEFFERSON COUNTIES, TEXAS, AND KIRBY FOREST INDUSTRIES, INC., AND UNKNOWN OWNERS, Defendants.

(Filed March 26, 1982)

CERTIFICATE OF CLERK

I, Murray L. Harris, Clerk of the United States District Court, Eastern District of Texas, do hereby certify that on the 26th day of March, 1982, I received from the United States of America, Plaintiff herein, and deposited in the Registry of the Court the sum of $2,835,508.06, represented by U. S. Treasury Check Nos. 178,726, 178,727, and 178,728 dated March 26, 1982 to the credit of the above numbered tracts.

THIS the 26th day of March, 1982.

MURRAY L. HARRIS, Clerk
United States District Court

By: /s/ FRANCES CHATMAN
Deputy

(Affix Seal)

Civil No. B-78-598-CA-MF-1525-54

Tract No. 189-09	
Tract No. 189-15	
Tract No. 189-18	
Tract No. 190-02	
Tract No. 190-05	
Tract No. 191-02	
Tract No. 191-05	$2,835,508.06

No. 82-1994

In the Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1994

KIRBY FOREST INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals enunciated an incorrect test for determining the date of taking of its property condemned by the United States pursuant to 40 U.S.C. 257.

On August 21, 1978, the United States filed a complaint in condemnation to acquire approximately 2,100 acres belonging to petitioner in Hardin and Jefferson Counties, Texas, for use as part of the Big Thicket National Preserve (Pet. App. A2; B4). In March 1979 the action was tried before a commission appointed pursuant to Fed. R. Civ. P. 71A (Pet. App. A2). On March 3, 1980, the commission entered its report, recommending an award of $2,331,202. Both parties filed objections to the report in April 1980. A hearing on the objections was held on January 28, 1981, and, on August 13, 1981, the district court entered judgment in the amount recommended by the commission plus interest at the rate of six percent from the date the complaint was

filed until the date of the deposit of the award (March 26, 1982) (Pet. App. B1-B11; A2).

The court of appeals reversed the award of interest on the basis of this Court's decision in *Danforth* v. *United States*, 308 U.S. 271 (1939), and remanded the case for further proceedings to correct certain inadequacies in the commission's report (Pet. App. A12-A13). The court held that no interest is due on an award of just compensation prior to the date of taking, which under the circumstances of this case was the date of payment of the award (Pet. App. A11). Rejecting the district court's conclusion that the mere commencement of condemnation proceedings denied petitioner any "economically viable use and enjoyment of its property" (Pet. App. B10), the court of appeals found that the government had neither entered into actual possession nor substantially interfered with petitioner's rights in its property prior to payment of just compensation (Pet. App. A11). The court specifically rejected the rationale of the Ninth Circuit Court of Appeals in *United States* v. *156.81 Acres of Land in Marin County, California*, 671 F.2d 336 (1982), cert. denied, No. 82-552 (Dec. 13, 1982).

Petitioner contends (Pet. 13) that the court of appeals improperly rejected the date of the filing of the complaint in condemnation as the date of taking. Whatever the merits of this contention,* it is not presently ripe for review by this Court. The court of appeals remanded the case to the district court for further proceedings, specifically directing

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*Because this case is interlocutory, we will not respond on the merits to the questions presented by the petition unless this Court requests that we do so. We note, however, that we believe the reasoning of the court below and the result reached by that court are correct. As we contended in our petition for a writ of certiorari in *United States* v. *156.81 Acres of Land in Marin County, California*, No. 82-552, the contrary result reached by the court of appeals in that case conflicts with this Court's decision in *Danforth* v. *United States*, *supra*.

consideration of petitioner's claim that the compensation awarded should be increased because the land is unique (Pet. App. A12). If petitioner is satisfied with the award on remand, its claims will be moot. If, on the other hand, petitioner is dissatisfied, it will be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of the final condemnation award. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1983

DOJ-1983-07

No. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

JOE G. ROADY
ROBBIN R. DAWSON
3700 First City Tower
Houston, Texas 77002

Of Counsel:
SHEINFELD, MALEY & KAY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

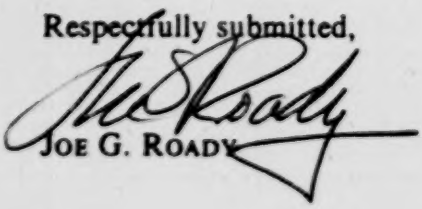
In response to the position of the Government that review by this Court of the decision of the Fifth Circuit Court of Appeals is "premature at this time," Petitioner respectfully calls to the attention of the Court the fact that the remand for further proceedings does not include the question of the determination of the date of taking. That matter, therefore, is final, is not, as contended by the Government, interlocutory, and is, therefore, ripe for review.

Petitioner sought review by this Court at this time in order to avoid a multiplicity of appeals. If the Court grants the petition and determines the question of the appropriate date of taking, certain guidelines would undoubtedly be provided to the District Court for its further handling of the case, and the question of the appropriate date of taking, being the essential cornerstone for the determination of whether additional evidence should be submitted below, will have been decided by this Court. Otherwise, the case will be returned for further handling in a posture in which the questioned decision of the Court of Appeals is the basis for further determinations by the District Court, rather than a controlling decision by this Court, in which event all matters decided below on remand will be of doubtful stability, requiring not only another appeal to the Court of Appeals, another petition to this Court, and yet another remand to the District Court for further proceedings in the event this Court should determine the date of taking question favorably to Petitioner in such subsequent proceeding.

Judicial economy suggests that the entire proceeding would be more efficiently concluded if this Court determines the date of taking question now rather than later.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,



JOE G. ROADY

Of Counsel:

SHEINFELD, MALEY & KAY

NO. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

JOE G. ROADY
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Of Counsel:

JOYCE COX
ROBBIN R. DAWSON
MARK BROWNING
DANIEL A. DEMARCO

Alpha Law Brief Co., Inc.—3806 Parkersburg—Houston, Texas 77036—771-3033

QUESTIONS PRESENTED*

1. Whether, under the Fifth Amendment, in a "straight" condemnation of unimproved real property pursuant to 40 U.S.C. § 257, the date of taking for the purpose of calculating interest due, if any, on the award is (i) the date the landowner is effectively denied the economically viable use and enjoyment of the property or (ii) the date of payment of the award.

2. Whether, in the resolution of the existing conflict between the Fifth and Ninth Circuits on the above question, this Court for the purpose of determining when a taking occurs in a straight condemnation should adopt (i) an analysis differing from the analysis given police power cases or (ii) a general rule applicable to all straight condemnations.

3. Alternative to the first question, whether under 16 U.S.C. § 698 (the act establishing the Big Thicket National Preserve) the date of taking was (i) the date of valuation or (ii) the date of the filing of the commission's report or (iii) the date of the judgment or (iv) such other date as may be determined under the facts of this case.

4. Whether the Court of Appeals erred in failing to sustain the finding of the District Court that Kirby was deprived of the beneficial use of its property as of the filing of the complaint in condemnation, in the absence of a holding that such finding was clearly erroneous.

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* The caption of the case contains the names of all of the parties in the proceeding to be reviewed.

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

OTHER AUTHORITIES

NO. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

Petitioner, Kirby Forest Industries, Inc. ("Kirby") herewith files its Brief on the merits, respectfully showing:

OPINIONS BELOW

The opinion of the Court of Appeals (Pet., App. A), styled United States of America v. 2,175.86 Acres of Land, is reported at 696 F.2d 351. The opinion of the District Court (Pet., App. B) is reported at 520 F. Supp. 75.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. Kirby filed its motion for rehearing on February 5, 1983, which was denied by the Court on March 10, 1983 (Pet., App. C). Petition for Writ of Certiorari was filed on June 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> ". . . nor shall private property be taken for public use without just compensation."

40 U.S.C. § 257 (1976) provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.[1]

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1. For the benefit of the Court, the provisions of the "Declaration of Taking" statute, 40 U.S.C. § 258a, and of Rule 71A, Fed. R. Civ. P., are printed in Appendices A and B hereto, respectively.

The provisions of 16 U.S.C. § 698, Pub. L. 93-439, Oct. 11, 1974, 88 Stat. 1254-61, the statute creating the "Big Thicket National Preserve," (hereafter, the "Act" and the "Preserve") under which this condemnation proceeding was filed, are printed in Appendix D to the Petition For Writ of Certiorari.

STATEMENT OF THE CASE

The Act was passed by Congress on October 1, 1974 and signed into law by the President on October 11, 1974, nearly eight years after the initial bill to authorize some form of Big Thicket enclave was introduced.[2] The Act included among the Preserve's "units" the 6,218 acre "Beaumont unit," which was publicly known prior to the passage of the Act to encompass Kirby's 2,175.86 acres of land involved here.[3] The boundaries of the several units were depicted on a map referred to in § 698(b) of the Act, which map clearly included Kirby's tract and was required by such section to be duly filed in the public records of the counties in question. Further, as required by § 698(b) of the Act, the Secretary of the Interior, through the Park Service, determined and published in the Federal Register on March 17, 1975, a detailed description of the boundaries of the Preserve, including the Beaumont unit. (Cozine, page 335).

This case began on August 21, 1978, by the filing of a complaint in condemnation (J.A. 5) under 40 U.S.C.

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2. The form of the enclave varied in successive bills from national park to national monument to national biological reserve to its final form, national "preserve", and consisted of twelve separate "units," some of which were connected by river corridors (the "string of pearls" concept). See Cozine, Assault on a Wilderness, The Big Thicket of East Texas, August, 1976 (Texas A & M University doctoral dissertation), hereafter referred to as "Cozine".

3. Kirby is an integrated forest products manufacturer, owning timberlands in East Texas and Louisiana to supply the raw material for its manufacturing facilities.

§ 257 (1976). Shortly thereafter, on August 30, 1978, the Government filed a notice of lis pendens in the record of the case (J.A. 7). The case was referred to a Commission under Rule 71A for value determinations.

On the first day of the hearing before the Commission, in response to the inquiry of the Chairman regarding stipulations, counsel for the Government and Kirby stipulated that that day, March 6, 1979, was the date of taking. (J.A. 19). All valuation testimony before the Commission was directed to the stipulated date of taking.

After entry of the Commission's report on March 3, 1980, the District Court, on August 13, 1981, entered its judgment adopting the Commission's findings awarding Kirby $2,331,202.00, plus interest at six percent per annum from August 21, 1978 (the date of the complaint) until deposit of the award. (J.A. 23). On March 26, 1982, while the case was on appeal to the United States Court of Appeals for the Fifth Circuit, the Government deposited the award.

The District Court determined that the date of the taking was the date of the filing of the complaint, based upon a finding that the "condemnation proceedings instituted by the United States Government have effectively denied Defendant (Kirby) economically viable use and enjoyment of its property since it is prevented from continuing its timber business." (See Pet., App. B, page B-10).

The Fifth Circuit reversed, Judge Jolly dissenting on this question. The majority held that because the Government had not taken actual possession, the date of payment of the award was the date of taking and that, therefore, no interest was due. Judge Jolly dissented on the question of the date of taking and, hence, Kirby's

entitlement to interest. He expressed the view that at least by the entry of a judgment in condemnation of unimproved property (distinguished from income-producing or improved property, which continues to provide benefits to the landowner) the landowner is "shackled from making economically viable use of his property," and, therefore, suffers a taking of his property at such time, if not before.

SUMMARY OF ARGUMENT

The position of Petitioner is supported by three alternative arguments, stated as follows:

I. Under the facts of this case, and applying the analysis made in regulatory power cases, a taking clearly occurred prior to deposit of the award, and therefore interest is due on the award; or

II. Under the facts of this case, and applying a different analysis to condemnation cases than to regulatory power cases, a taking clearly occurred prior to the deposit of the award, and therefore interest is due on the award; or

III. Considering the broader application of constitutional principles to condemnation suits, this Court should adopt minimum standards under the Fifth Amendment to apply to all federal condemnations under 40 U.S.C. § 257.

I.

Under the facts of this case, involving a condemnation for a wilderness preserve, the purpose of which is to preserve the natural environment by prohibiting all commercial exploitation of property, a taking occurred when acts of the Government effectively accomplished the pur-

pose of the condemnation. An owner of unimproved property against which a condemnation is pending for the purpose of preserving the property as is, *e.g.*, a wilderness preserve, a national seashore, a scenic view, is effectively prevented by the mere pendency of the condemnation suit from exercising his ownership rights which may hamper or destroy the purpose of the taking. This is particularly true here, where Kirby had agreed to a moratorium on logging and promised to continue it during the acquisition process, and Congress acted upon such promise. Kirby was denied economically viable use of its property after the filing of the complaint in condemnation, as the District Court correctly found.

Under the unquestioned principles previously announced by this Court, it is not necessary that the Government actually take possession, or that judgment be entered divesting the owner and investing the Government with title and right of possession, to have a "taking" of property. If Government actions deny an owner any economically viable use of his property, a taking occurs, as the Ninth Circuit in *United States v. 156.81 Acres of Land,* 671 F.2d 336 (9th Cir. 1982), in conflict with the Fifth Circuit in this case, has correctly held. The Fifth Circuit's reliance upon *Danforth v. United States,* 308 U.S. 271 (1939), as holding that a taking never occurs (absent possession) until payment is made, is misplaced and wrong. The Court of Appeals erred in rejecting the specific finding by the District Court that Kirby had been deprived of any viable economic use, and in suggesting its own remnant use, recreation. The District Court finding was not clearly erroneous under Rule 52(a), Fed. R. Civ. P.

Kirby, however, remains willing to abide by the stipulated date of taking, which it continues to regard as a

binding agreement reached in open court with Government counsel.[4]

In view of potential remand, and in order that a complete judgment on all issues may be entered in the Court below, Petitioner respectfully requests the Court to address, if interest is determined to be due, the question of the appropriate rate of interest and the means by which it is to be determined. Just compensation requires a market rate of interest. See *Phelps v. United States,* 274 U.S. 341 (1927), *United States v. Blankinship,* 543 F.2d 1272 (9th Cir. 1976).

Finally, even if the result reached by the Fifth Circuit as to the date of taking is affirmed, Petitioner should be afforded the opportunity, upon remand, to present evidence of increased value of its property through such date.

II.

Heretofore, few, if any, analytical distinctions have been made in "taking" cases between regulatory (police) power cases and eminent domain cases. While it has been recognized that passage of title is one quite apparent distinction (see, e.g., *Danforth*), where the contention is made that a taking in an eminent domain case under 40 U.S.C. § 257 occurred prior to passage of title, the same type of analysis given to police power cases has been applied to the eminent domain case [see *United States v. Rogers,* 255 U.S. 163 (1921)], and Petitioner makes that application here under Point I. We urge under Point II, alternatively, that a different analysis should be made, one which addresses

4. It has been Kirby's consistent position that it was bound by the stipulation, and its position will be no different before this Court. If the stipulation may properly be disregarded, however, then the date of taking found by the trial court should prevail.

the conceptual as well as the practical distinctions between the police power and the eminent domain power. The adoption by this Court of such analysis, moreover, will not depart from existing Fifth Amendment principles. Such analysis depends basically on the clear application of the principles (1) that value is to be determined as of the date of taking, *United States v. Miller,* 317 U.S. 369 (1943) and (2) that it is the deprivation of the owner and not the accrual of a right or interest to the sovereign, which constitutes the taking, *United States v. General Motors,* 323 U.S. 373 (1945).

Under such analysis, the assertion by the Government of the power of eminent domain, by a means which clearly defines the intent to take, is given special consideration in the analysis of whether a taking has occurred prior to the date of payment or passage of title. This element in the taking analysis is obviously not present in police power cases, which suggests that a different analysis should be made.

By considering the assertion of the power to take, a lesser degree of interference than that required in police power cases would be sufficient to constitute a taking in an eminent domain case.

III.

The condemnation procedure created by 40 U.S.C. § 257 allows unjust results to occur, contrary to the mandate of the Fifth Amendment that compensation for takings for public use shall be "just".

The problem inherent in "straight" condemnation proceedings is that the date of payment *always* follows the date of valuation. If the date of taking is determined to be the date of payment, then the date of taking is

always subsequent to the date of valuation, contrary to the elementary constitutional requirement that an owner is entitled to receive compensation based upon the value of the property *at the date of taking. United States v. Miller, supra; United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938).

Despite the difficulties presented in devising a uniform rule to determine whether takings occur in police power or inverse condemnation situations, Petitioner contends that a uniform rule may be stated in straight condemnation cases, the essential purpose of which is to prevent the distortions allowable under the existing procedure, and to assure that just compensation is paid.

The rule which Petitioner proposes may be stated as follows:

> Because in a straight condemnation (absent prior possessory acts) the filing of the complaint in condemnation is an assertion of a right and intent to take, the effect of which in every case is to impose a direct, material, and adverse interference with the ownership interests in the property, and which according to legitimate expectation will result in a divestiture of title for a public use, the date of taking for the purpose of determining just compensation is the date of the filing of the complaint.

The foregoing rule is consistent with existing principles and case interpretation, except that it ends the confusion in determining a date of taking (where it is contended that a taking occurred prior to the date of payment). It abolishes reliance on the arbitrary "date of payment" concept of taking by properly emphasizing the deprivation of the owner rather than the accrual of the right of the sovereign.

ARGUMENT

I.

Under The Facts Of This Case, A Taking Occurred As Of The Date Of The Filing Of The Condemnation Complaint By The United States, Which Denied Kirby The Economically Viable Use Of Its Property.

A. Nature of the Dispute.

The dispute in this case can be narrowed by first noting certain principles which are *not* in dispute. Just compensation, this Court has stated, means "the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller, supra.* It means the "Full equivalent of the value of [the use of the property] at the time of the taking paid contemporaneously with the taking." *Phelps v. United States, supra.* There is no dispute that an owner whose property is taken for public use is entitled to "just compensation" therefor, with value determined as of the date of taking. *United States v. Dow,* 357 U.S. 17, 20 (1958); *United States v. Miller, supra.* Neither is it disputed that where a "taking" precedes payment of compensation, the Fifth Amendment requires that interest be paid from such date as a part of just compensation. *United States v. Dow, supra; Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299 (1923); *United States v. Rogers, supra.* What is disputed in this case is whether a "taking" occurred prior to the payment of the award by the Government, such payment not being made until this case was before the Fifth Circuit, some *eight* years after Congress had designated this specific property to be preserved in a wilderness area, nearly *four* years after the condemnation suit was commenced and notice of lis pendens filed, *three*

years after a stipulated "date of taking" and date of valuation, and *seven months* after the District Court's judgment. Throughout such time, the property was preserved in its wilderness condition, which was the basis for the public acquisition of the property. During this period, in keeping with promises made to Congress, (see p. 17, *infra*), Kirby cut no timber and undertook no development, paying taxes all the while. Yet, the United States would have this Court hold that Kirby has received the "full and perfect equivalent in money of the property taken" and has been put in "as good a position pecuniarily as [it] would have occupied if the property had not been taken." Such a conclusion simply cannot be made under modern concepts of "taking" and "property".

B. Historical Treatment of Possession as Prerequisite for Taking.

Early English concepts of "taking" and "property" involved the idea that "taking" required actual invasion and "property" meant the physical *res,* with no obligation of the sovereign to pay for property merely damaged, but not seized.[5] Although the English concept of requiring compensation to a property owner for the physical deprivation of property, grounded in the Magna Carta[6] and Blackstone's Commentaries,[7] was imported to the American colonies, a view existed in certain colonies that undeveloped land was so valueless that no compensation was due when it was taken by the government.[8]

The judicial trend in this country since the adoption of the Fifth Amendment has been toward an expanding

5. Nichols on Eminent Domain (1979 and 1983 Supp.) ¶ 1.21.

6. *Id.*

7. 1 Bl. Comm. 139.

8. Bosselman, F., "The Taking Issue" (U.S. Gov't. Printing Office 1973) at 85.

recognition that "takings" are not of the physical *res* itself but of the ownership rights and interests therein, thus requiring no actual invasion of the premises. Since *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), this Court has consistently recognized that mere regulation of property, "if regulation goes too far . . . will be recognized as a taking." Where a governmental action or regulation causes a loss to an owner "as complete as if the United States had entered upon the surface of the lands and taken exclusive possession of it," *United States v. Causby,* 328 U.S. 256, 261 (1946), or where a regulation "denies an owner economically viable use of his land," *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980), *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), a taking occurs.

Consistently with the expansion of the taking concept, the concept of property has come to mean the legal relationship between owner and property: "The legal relations of the individual cover every aspect of his existence, and when there is violation of these relations his property is taken". Cormack, *Legal Concepts In Cases Of Eminent Domain,* 41 Yale L. J. 221, at 259 (1931). ". . . '[P]roperty' in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person." Stoebuck, *A General Theory Of Eminent Domain,* 47 Wash. L. Rev. 553, 606 (1972, hereinafter "Stoebuck").[9] The matter is settled in this Court. In *United States v. General Motors,* 323 U.S. 373 (1945), Justice Roberts for the Court held that the proper construction of the word property in its "more accurate sense," denoted "the group of rights inhering in the citizen's relation to the

9. See also, Cohen, *Property and Sovereignty,* 13 Cornell L. Q. 8 (1927), and Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165 (1967), (hereafter, "Michelman").

physical thing, as the right to possess, use and dispose of it." (323 U.S. at 378).

Just as judicial concepts of the types of property interests protected by the Fifth Amendment have broadened, so, too, has the judicial recognition of the value of unimproved property. Not only is such property entitled to Fifth Amendment protection, but indeed may have characteristics which render governmental actions with respect to it a "taking" in circumstances where improved, income-producing property may not be found to have been taken. The lack of early American cases concerning acquisition for unimproved land may stem from the aforementioned colonial idea that compensation for unimproved land was unnecessary, from the abundance of such land during the country's early years,[10] or from the fact that acquiring land for parks or wilderness areas is a comparatively recent phenomenon. See *Shoemaker v. United States,* 147 U.S. 282, 297 (1893).

In more modern times, however, courts have given greater recognition to the unique burdens placed upon unimproved lands targeted for preservation. In *Bydlon v. United States,* 175 F.Supp. 891 (Ct. Cl. 1959), an executive order banned airplane flights to property in a remote corner of a public wilderness region, the Superior National Forest in Minnesota. After noting that the purpose of the executive order was "protecting the public welfare by means of preserving for public recreational use the aesthetic values of the wilderness," the Court of Claims found that a "taking" of the private property had occurred. *Cf. Drakes Bay Land Co. v. United States,* 424 F.2d 574 (Ct. Cl. 1970) (Delay and actions by the United States

10. "When thousands of square miles of arable land were unused and unoccupied, unimproved land, although held in private ownership, had no substantial value." 1 Nichols on Eminent Domain (1979) ¶ 1.22[1].

to prevent development of unimproved land designated for inclusion in a national seashore held a taking.)

In 1969, the Supreme Court of New Jersey, on facts analogous to the instant case, held that the filing of a condemnation complaint to acquire vacant, unimproved land in a state "Green Acres" program constituted a taking, and awarded interest from the date of the complaint:

> The economic realities of the situation preclude improvement, since the valuation of the property is frozen the day the complaint is filed, preclude leasing, since the tenancy would be precarious, and preclude sale, since the complaint is a substantial cloud on the title. The landowner's property is virtually straitjacketed, but tax and mortgage obligations continue unabated.

State v. Nordstrom, 54 N.J. 50, 253 A.2d 163, 166 (1969).

Five years later, in a case also dealing with unimproved property, the Alaska Supreme Court adopted the reasoning of *Nordstrom*, which it characterized as "sensitive to the economic realities of public condemnation," holding:

> If as a matter of constitutional law the property owner is entitled to interest from the moment the State takes legal possession, he should, *a fortiori*, receive interest where he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities.

Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1247 (Alaska, 1974).

In addition to the two Ninth Circuit cases discussed *infra*, recent decisions by other federal courts have also awarded interest prior to the passage of title to title in

condemnation proceedings, focusing on the economic realities of public condemnation. The District Court decision in the instant case (by Judge Robert M. Parker) followed a decision in the same district by Judge Joe H. Fisher awarding interest from the date of a commission award in another Big Thicket case. *United States v. 59.29 Acres of Land,* 495 F. Supp. 212 (E.D. Tex. 1980). Judge Fisher who, like Judge Parker, was thoroughly familiar with the effects of the numerous Big Thicket condemnation suits pending in the Eastern District of Texas, held that a landowner does not receive the full equivalent of the value of his property paid contemporaneously with the taking when there is a significant delay between the date of valuation and date of payment. 495 F. Supp. at 216. See also, *Foster v. City of Detroit,* 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd,* 405 F.2d 138 (6th Cir. 1968) (dealing with improved property); *United States v. Certain Lands in Eastham, Truro and Wellfleet,* C.A. No. 68-208-C, (Order of May 28, 1982), *infra,* Appendix C.

C. Effects of the Condemnation Proceeding on the Property in Question.

Although Kirby does not suggest that a taking occurred at a time prior to the filing of the Government's condemnation complaint in this case, nevertheless an understanding of the events giving rise to the condemnation proceeding is necessary to demonstrate the effect of the filing of such complaint on the property in question.

Interest in preserving certain areas of the Big Thicket, including that portion of Kirby's property involved here, has long existed, but intensified after the Advisory Board on National Parks, Historic Sites, Buildings and Monuments conducted studies of the area in 1965-1967. See

S. Rep. No. 875, 93d Cong. 2d Sess. U.S. Code Cong. & Ad. News, 5554, 5555 (hereinafter cited as "Leg. Hist. at ____"). See also, Cozine, page 210. Bills to establish a Big Thicket park or preserve were introduced beginning in the 89th Congress in 1966. *Id.*, page 221. Passage of P.L. 93-439 ultimately occurred in October, 1974. *Id.*, p. 326. The Big Thicket Preserve was established amid fears that "logging, clearing for agricultural uses and oil field operations, and more recently, vacation home subdivisions" were dividing the Big Thicket into "blocks of ecological islands" which "were steadily being encroached upon." Leg. Hist. at 5555.

Kirby's property at issue in this case was unique among the various "ecological islands" making up the Big Thicket Preserve in two respects: its near-total lack of logging or development and its proximity to the growing city of Beaumont, Texas, a city of 118,000 in 1970. (1970 Census). As to the natural state of Kirby's property, S. Rep. 93-875 noted:

> [I]t remains perhaps the wildest component of all of the units to be included in the Preserve. . . . Although some cypress may have been harvested in the area at some time, part of it has never been logged and it is doubtful that a better stand of basic hardwoods exists anywhere in North America.

Leg. Hist. at 5557.

Thus, the value of the property in question to the United States lay principally in its *non-use*, or preservation in its natural state, particularly as to timber cutting. A problem which faced Congress was how to maintain the wilderness state of such property during the acquisition process. The original House-passed bill provided for a "legislative taking", but in Committee, the Senate amended the proposed statute to delete that provision. Two specific

reasons prompted the change: (1) the economic cost to the National Park Service acquisition program of having interest run from the date the Act became law, and (2) the Committee's belief that the areas to be included in the Preserve were not in imminent danger of destruction. *Id.* at 5558. The basis for the belief that the Preserve areas were not threatened is important to the resolution of this case:

> The Committee was assured during the hearings on this legislation that those timber companies with holdings in the area will, in good faith, continue the moratorium once specific boundaries are designated.

Id.

It should be noted that both reasons for the Senate's deletion of a "legislative taking" provision proved to be well-founded. Rather than interest beginning to run as of a legislative taking date in October, 1974, the earliest date upon which interest is claimed by Kirby is August 21, 1978, almost four years later. Secondly, Congress' reliance on Kirby's "good faith" proved to be justified. Kirby neither cut timber nor conducted any development on the land between 1974 and 1982, when title passed to the United States, preserving the property in the same pristine condition which Congress desired. Kirby thus stands penalized for refraining from accepting the open invitation present in the rationale of the Fifth Circuit: *to cut down the trees.* The argument that the Government did not "in any way interfere with [Kirby's] use of the property," cannot be sustained, as the District Court recognized and found.

D. Decisions of Fifth and Ninth Circuits.

The holding of the Fifth Circuit below as to the date of taking of Kirby's property conflicts with two Ninth

Circuit cases awarding interest prior to payment of awards.[11] The Fifth Circuit followed what it perceived as the directives of *Danforth v. United States,* 308 U.S. 271 (1939) in concluding that no interest is due a landowner prior to payment of the award and passage of title. Because *Danforth's* applicability, or lack thereof, underlies the conflict between the Fifth and Ninth Circuits, it is important to consider the facts and the precise holding of *Danforth* before focusing on the Fifth and Ninth Circuit decisions.

1. Danforth.

Two important aspects of this Court's decision in *Danforth* were overlooked or misunderstood by the Fifth Circuit Court. First, the *Danforth* Court based its holding on the particular facts and statute before it, which differ markedly from the facts and statute of the instant case. Secondly, the *Danforth* opinion itself recognized that a taking can occur prior to passage of title depending upon the burden actually placed on property by Government action, and did not purport to establish the inflexible rule ascribed to it by the Fifth Circuit.

Danforth construed the Flood Control Act of 1928, 33 U.S.C. §§ 702a - 702m, which authorized the Secretary of War to acquire lands or easements for flood control projects on the Mississippi River. The property owner in *Danforth* contracted with the United States Army for the conveyance of a perpetual flowage easement at a set price. The Government attempted to withdraw from its contract and have the easement's value redetermined in

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11. *United States v. 15.65 Acres of Land,* 689 F.2d 1329 (9th Cir. 1982); *United States v. 156.81 Acres of Land,* 671 F.2d 336, 338 (9th Cir. 1982), *cert. den.,* _____U.S._____, 103 S.Ct. 569 (1982).

a condemnation suit, but this Court enforced the contract as to value. In *Danforth*, a set-back levee was constructed to channel floodwaters through an area including Danforth's land, which was to be inundated in times of severe flooding by means of a lowered "fuse-plug" levee. The set-back levee was not located on Danforth's land. Although Danforth alleged that a taking occurred when the set-back levee was completed, both the fuse-plug and the main levee remained at the same height as prior to construction of the set-back levee. 308 U.S. at 286. Thus, Danforth's property was as well protected from flooding as it had been prior to construction of the set-back levee. *Id.* No argument was presented or considered in *Danforth* that the owner therein was deprived of all economically viable use of his land.

The Fifth Circuit has apparently held that *Danforth* establishes a rule in all straight condemnation cases that taking occurs when payment of an award is made. Such construction is refuted by *Danforth* itself, where this Court stated: "The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction." 308 U.S. at 286. The Court then noted that no such burden was present in *Danforth* because the property enjoyed the same protection from floods as prior to construction of the levee in question. The Court's reference to the burden which may be placed on property presents the question in the instant case of whether Kirby's property "actually experienced" a greater burden after the filing of the condemnation complaint "even without direct appropriation", in the words of *Danforth*. That Kirby experienced a burden as to its property because of the condemnation suit is apparent,

and the District Court so found. The District Court, consistently with the Ninth Circuit, the Supreme Courts of New Jersey and Alaska, and the other federal cases cited *supra,* properly recognized the economic realities of the burdens experienced by Kirby, in keeping with the above-quoted language in *Danforth,* as well as with the qualifying phrase preceding the holding in *Danforth*: "Unless a taking has occurred previously *in actuality,* or by a statutory provision [the taking occurs upon payment of the award]." 308 U.S. at 284, [emphasis added]. *Danforth* also held that for the completion of the set-back levee to amount to a taking, "it must result in an appropriation of the property to the uses of the Government." 308 U.S. at 286. The "uses of the Government" in preserving a wilderness are simply to accomplish *non-use* by the owners, thereby preventing the use of the property or any interests therein in any manner inconsistent with the integrity of the land as a wilderness. This goal is effectively accomplished by the "chilling" effect of the acts of the Government in pursuing the announced acquisition of the designated lands. Kirby's contention (in fact supported by *Danforth*) is precisely this: that, in actuality, a taking occurred at the time of the complaint as a result of the burdens, actually experienced, which effectively appropriated Kirby's property to the uses of the Government.

2. The Fifth Circuit Position.

The Fifth Circuit, "on the authority of *Danforth*", held that where the Government proceeds by straight condemnation, and "has not entered into actual possession or substantially interfered with the landowners' rights in their property prior to payment, the date of taking is the date of payment." 696 F.2d at 357. The majority (with

Judge Jolly dissenting on this question) gave the following reasons for its decision:

(1) The government may back out of the project until payment, "[j]ust as in *Danforth.*"

(2) The government, "as in *Danforth* . . . has not yet appropriated the landowners' property to the uses of the government."

(3) "In fact, Danforth had suffered more injury than the landowners here, since his land had already been flooded as a result of the government's flood control operations."

Id. at 356.

As to the first reason stated, it was indeed theoretically possible for the United States to "back out" of the Big Thicket project even after the complaint in this suit was filed. Such a *possibility,* however, ignores the *realities* that (i) Congress declared, in § 698(a) of the Act, that the Big Thicket National Preserve "is hereby established", (ii) Kirby's property had been designated by Congress, and by metes and bounds description in the Federal Register, to be included in the Preserve, (iii) Congress had directed the "prompt" acquisition of the property by the National Park Service, (iv) Kirby's tract had "the highest rank in wilderness quality in the entire area studied" [Leg. Hist. at 5567, Recommendations of Department of The Interior], (v) acquisition of other tracts in the project was well underway and (vi) the United States had filed a notice of lis pendens shortly after the filing of the complaint, casting a cloud on Kirby's title. The fact that the overwhelmingly likely event of Government acquisition did in fact occur in this case undermines the weight of the Fifth Circuit's conjecture as to possible abandonment.

The Fifth Circuit's second reason for its holding—that the Government had not yet appropriated Kirby's property for its use—defies both logic and the facts of this case. The "use", actually the non-use, made of Kirby's property subsequent to the complaint was its preservation as a wilderness. It strains credulity to say that valuable timberland, withheld from harvesting by a timber company in keeping with promises relied upon by Congress, had not been appropriated to the wilderness preservation use of the Government. The insight of the New Jersey Supreme Court in *Nordstrom* on this point is enlightening:

> [T]he need for compensation is particularly acute in a case, such as the present one, where the burden placed upon the landowner during the intermediate period corresponds to a benefit conferred upon the State. Here unimproved land was being condemned for the purpose . . . of maintaining the property in its unimproved condition. In effectuating the State's condemnation purpose during the intermediate period the Nordstroms were being subjected to a "scenic easement", a benefit to the State. . . .

253 A.2d at 166.

The Fifth Circuit's third stated basis for its holding—that Danforth suffered more injury than Kirby—erroneously characterizes the *Danforth* facts. True, as the Fifth Circuit noted, Danforth's lands were actually flooded when the Government made crevasses in a levee during a record flood. But, as this Court noted, "the land of [Danforth] would have been flooded without the crevassing." 308 U.S. at 279. After the flood, the levee was restored to its former height and the land was "as well protected from destructive floods as formerly." 308 U.S. at 286. Additionally, of course, the Government acquired only an easement over Danforth's land, the use of which was

presumably otherwise retained, whereas Kirby's economic use of its property was wholly frustrated.[12]

The fault of the Fifth Circuit majority decision lies in its rigid application of selected language from *Danforth* out of context, its failure to give proper weight to other language of *Danforth* dealing with burdens actually experienced by a landowner, its mischaracterization of the facts in *Danforth* and its refusal to recognize, as did the District Court, the economic realities of Kirby's situation, all of which totally distinguish this case from *Danforth.*

3. The Ninth Circuit Position.

In contrast to the Fifth Circuit, and with a marked similarity to the District Court in this case as well as to *Nordstrom* and *Stewart & Grindle,* the Ninth Circuit has explicitly recognized that blind application of selected portions of *Danforth* makes little sense in the face of obviously different facts. Consistently with the pronouncements of this Court,[13] two separate Ninth Circuit panels have recognized that "there is no simple formula for establishing when property has been taken," *United States v. 15.65 Acres of Land,* 689 F.2d 1329 (9th Cir. 1982) and that "[t]he Supreme Court has refused to adopt any hard and fast rule determining when a taking occurs," *United States v. 156.81 Acres of Land,* 671 F.2d 336, 338 (9th Cir. 1982), *cert. denied,* ____

12. The Fifth Circuit, in refusing to distinguish between improved and unimproved property, stated that a judgment in condemnation of unimproved wilderness land did not deprive the owner of a "present use" because "the wilderness property continues to provide recreational uses." 696 F.2d at 357. It gave no basis for its statement nor any indication of whether it considered such use to have economic value analogous to rents and profits from improved property.

13. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978).

U.S.____, 103 S.Ct. 569 (1982). Although the two Ninth Circuit panels differed as to when the taking occurred,[14] both cases properly read *Danforth* as requiring an inquiry into the burdens actually experienced by the property interests in question.

As to the economic burdens actually experienced during a condemnation of unimproved land designated for preservation purposes, the Ninth Circuit noted:

> [T]he owner following a condemnation suit frequently loses more than just value; he may be deprived of all economic use of his land. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S.Ct. 2138, 2142 n.9, 65 L.Ed.2d 106 (1980). Also, as was pointed out in the majority in *United States v. 156.81 Acres*, 671 F.2d 336 (9th Cir. 1982), no one would improve the property after the date of valuation because the government could acquire it at a pre-improvement price. [Citations omitted.] The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking.

United States v. 15.65 Acres of Land, 689 F.2d at 1334.

E. What Constitutes a Taking of Property.

The Ninth Circuit's approach squares with the approach of this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and other cases

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14. In *United States v. 15.65 Acres of Land*, a stipulated date of *valuation* was held to be the date of taking where such valuation preceded trial by more than a year, 689 F.2d at 1334. In *United States v. 156.81 Acres of Land*, where valuation preceded trial by only one month, the date of *judgment* was held to be the date of taking. 671 F.2d at 340.

cited therein, in considering on a case-by-case basis the factors alleged to constitute a taking. This Court identified the following factors as bearing upon the question of whether a taking has occurred: (i) the economic impact of Government action on the claimant, (ii) the reasonable investment-backed expectations of the property owner and (iii) the character of the governmental action. 438 U.S. at 124; *See, also, Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

Consideration of the first factor above, the economic impact of Government action, leaves considerable room to determine whether a taking has occurred in cases where a property owner continues to receive substantial economic benefits despite the governmental interference. *See, e.g., Shoemaker v. United States,* 147 U.S. 282 (1893) ("But the owner was in receipt of the rents, issues and profits during the time occupied in fixing the amount to which he was entitled." 147 U.S. at 321.); *Gould v. United States,* 301 F.2d 557, 559 (D.C. Cir. 1962) ("Until then [date of payment of award] the owners continued to hold title as well as possession of the property and received income from it."). In marked contrast to cases where an owner receives rents or profits from property during condemnation, Kirby received nothing but tax liabilities from its property during the almost four years of condemnation proceedings before payment.

Recent decisions of this Court attribute significant weight to a second factor in the analysis of whether a taking has occurred: the interference of government with reasonable investment-backed expectations of a property owner. *Penn Central,* 438 U.S. at 136-37; *Kaiser Aetna,* 444 U.S. at 179. The crux of this Court's holding that a "taking" did not occur in *Penn Central* was the determination that the New York City ordinance in question (1) did

not deprive Penn Central of a reasonable rate of return on its property, (2) did not prevent the property's existing use, and (3) allowed Penn Central to transfer valuable development rights. The facts of the instant case are revealing by comparison: Kirby's rate of return during this suit was not only not reasonable, it was non-existent. Both timber harvesting and development were entirely prevented by the contemplated government use. Kirby's investment-backed expectations were totally frustrated.

The third factor identified in *Penn Central,* the character of the government action, is discussed, *ante* at pp. 15-17, to which reference is made. Petitioner emphasizes to the Court that the action taken here is similar to the action taken by the United States in *Kaiser Aetna*: the filing of a lawsuit (although not a condemnation suit) to determine Kaiser Aetna's right to exclude the public from a marina. If the Government had succeeded in enforcing a navigational servitude in that case, it would have had the effect of an actual invasion of the property. 444 U.S. at 180.

The analysis outlined above is demonstrated in numerous cases decided by this Court, although this case presents a question not previously decided: where the uses of the government in the preservation of a wildnerness are accomplished by the mere pendency of condemnation proceedings, has a taking occurred? That it has in this case is readily demonstrated by applying basic principles previously adopted by this Court.

The basic concept applicable here is that it is the deprivation of the owner, and not the accrual of a right or interest to the sovereign, by which the determination of whether a taking has occurred is measured. That this concept is the primary question in the taking analysis was noted by Justice Holmes for the Court in *Boston Chamber*

of Commerce v. City of Boston, 217 U.S. 189 (1910), where the question was whether the existence of an easement to which the fee was subject could be ignored in determining value. The Court announced the rule:

> "[T]he Constitution . . . requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained."

217 U.S. at 195.

The rule found its most prominent exposition in *Pennsylvania Coal Co. v. Mahon, supra*, a police power case. There again, Justice Holmes for the Court (Justice Brandeis dissenting) set forth the following often-cited language:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. *When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.*

260 U.S. at 413 (emphasis added).

More pointedly, however, this Court in *United States v. General Motors, supra*, settled the question. There, in holding that compensation was due for the full measure of the loss of temporary occupancy of a building, includ-

ing consideration of move-out and other related expenses, the Court, through Justice Roberts, reasoned as follows:

> In its primary meaning the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what one destroys. But the construction of the phrase has not been so narrow. *The Courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.* Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

323 U.S. at 378 (emphasis added.)

It is manifest from the foregoing cases, and others such as *Dugan v. Rank,* 372 U.S. 609 (1963) and *Penn Central Transportation Co. v. City of New York, supra* (see 438 U.S. at 123, n.23), that where the Government acts, without the necessity of actual possession or the accrual of an interest (such as the passage of title), to subordinate the owner's interests to the uses of the Government, which results in the deprivation of profitable use thereof by the owner, a taking in Fifth Amendment analysis occurs.

Further, as we have seen, *infra,* p. 12, the "property" interest with which the act of the Government interferes is the ownership interest in the rights incorporated within the concept of title. The filing of the complaint in condemnation (alone would be sufficient but certainly with the contemporaneous filing of a notice of lis pendens) interferes with that ownership interest. And where the purpose of the Government is to accomplish its goal precisely by

that interference, i.e., to require *non-use* of the property, such an interference may be compared without inaccuracy to a direct invasion. According to Professor Michelman, the "negative restraint" involved in seeking to prevent use in order to preserve some physical characteristic of the property is no different from "affirmative occupancy."[15]

Clearly, a direct invasion or "affirmative occupancy" is a taking, *Loretto v. Teleprompter Manhattan CATV Corp.*, ____U.S.____, 102 S.Ct. 3164 (1982), and manifestly would satisfy any standard allowing interest to be paid where taking precedes payment of the award.

The view that an interference which effects the equivalent of a servitude constitutes a taking is supported by *United States v. Dickinson*, 331 U.S. 745 (1947), in which Justice Frankfurter for a unanimous Court held that

> Property is taken in the constitutional sense where inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by an agreement or in course of time.

331 U.S. at 748.

Such view is also supported by the views of Justice Brennan in his dissent in *San Diego Gas & Electric Co. v.*

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15. Michelman, page 1186-1187: "Just as we say, when government behaved as though it owns an easement of way over my land (by regularly passing through), that it has 'taken' the 'property' consisting of such an easement and therefore must pay for it, we may say that when government behaves as though it owns a servitude burdening my land (by threatening to invoke a judicial remedy to prevent my making a certain use of it) it has 'taken' the 'property' consisting of the servitude and therefore must pay for it. Wordplay—in short dogged adherence to the constitutional formulas of 'taking' and 'property'—cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint."

City of San Diego, 450 U.S. 621 (1981).[16] There, Justice Brennan remarked as follows:

> It is only logical, then, that government action other than acquisition of title, occupancy or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.

450 U.S. at 653.

It is clear that with the cloud on title imposed by the condemnation suit, Kirby was effectively prevented from (1) selling the land, (2) selling the timber, (3) building improvements, (4) mortgaging the property, (5) cutting the timber and (6) subdividing and selling lots. In short, there were no "investment-backed expectations" or "economically viable uses" which remained. Kirby was deprived of all or most of its interest in the property. The interference therefore effectively took the property, entitling Kirby to just compensation from the date of the filing of the complaint.

F. The District Court's Finding Was Not Clearly Erroneous.

The Fifth Circuit erred, under Rule 52(a), Fed. R. Civ. P., in rejecting the District Court's finding that the filing of the condemnation complaint "effectively denied Defendant (Kirby) economically viable use and enjoyment of its property since it is prevented from con-

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16. Joined in his discussion of the merits presented by that case by Justices Stewart, Marshall and Powell, Justice Brennan's views may be regarded as the views of a majority of the Court then sitting in view of the observation by Mr. Justice Rehnquist in his concurring opinion that as to the merits he "would have little difficulty in agreeing with much of what is said . . ." by Justice Brennan. (450 U.S. at 634).

tinuing its timber business." 520 F. Supp. at 80.[17] Findings of fact, including inferences and conclusions of the trial court, are not to be disturbed on appeal unless clearly erroneous. *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The Fifth Circuit did not indicate whether it was applying a clearly erroneous standard to the findings of the District Court, but instead referred to there being "no orders from the government not to reinstate logging operations" and said Kirby had made "no showing that the filing of the complaint deprived the landowners of the use of their property." 696 F.2d at 355. Because it was undisputed that (i) the timber companies had expressly promised Congress not to harvest timber during acquisition proceedings [Leg. Hist. at 5558], (ii) that Kirby had in fact observed such a promise, (iii) that the Government had filed a notice of lis pendens in order to cloud the title to the land and (iv) that Kirby had remained liable for taxes on the property during the proceeding, there is ample support for the District Court's finding, which easily passes muster under the "clearly erroneous" standard of Rule 52(a).

G. The Stipulated Date of Taking.

Attorneys for Kirby and the United States stipulated at the hearing before the commission appointed to value the property that the "date of taking" herein was March

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17. This finding, which is not a conclusion of law, was set forth in the District Court's opinion, which adopted findings of fact of the Commission except as to prejudgment interest, which was not argued before the Commission. As to prejudgment interest, the portion of the District Court's opinion quoted above constitutes such Court's findings of fact. As Rule 52(a) states, "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

6, 1979 (J.A. 19). Although Kirby believes the District Court's determination that a taking occurred as of the date of the complaint is supported both by the facts and the authorities, Kirby remains willing to abide by the stipulated date of taking, some seven months after the complaint was filed.

The Government has relied below on *United States v. Mahowald,* 209 F.2d 751 (8th Cir. 1954) in arguing that it is not bound by a stipulation as to the date of taking. The stipulation in *Mahowald,* however, was an informal agreement reached in chambers. The stipulation in the instant case, by contrast, was formally made a part of the record at the valuation hearing. "Date of taking" is a term of art in condemnation proceedings, and a stipulation in open court by experienced trial counsel as to "date of taking" rather than "date of valuation" should bind both parties, particularly, as here, where the property is already dedicated to the proposed government use.

Additionally, this Court has readily given effect to agreements between landowners and the United States as to the *valuation* of property in condemnation suits. *Danforth* held a letter agreement between a landowner and a district engineer to be binding as to valuation in a subsequent condemnation suit. *Albrecht v. United States,* 329 U.S. 599 (1947), similarly enforced a contract as to valuation in a condemnation suit. No reason exists why a stipulated, on-the-record agreement between counsel, during a condemnation suit, as to the "date of taking" should be any less binding than a letter agreement or contract between non-attorneys prior to suit as to valuation.

H. Interest on Remand.

The District Court awarded interest at six percent per annum, the legal rate of interest under Texas law.

Because interest from the date of taking is an element of just compensation under the Fifth Amendment, it "cannot be made to depend upon state statutory provisions." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1923). Just compensation means "the full equivalent of the value of [the use of the property] at the time of the taking paid contemporaneously with the taking." *Phelps v. United States*, 274 U.S. 341 (1927). *See, also, United States v. Miller*, 317 U.S. 369 (1943). This point was raised in the Court of Appeals, but because of its holding on the taking question, was not addressed by the Court. Therefore, on remand the District Court should be directed to determine a proper rate of interest based upon interest rates obtainable by "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal." *United States v. 429.59 Acres of Land*, 612 F.2d 459, 465 (9th Cir. 1980). *See, also, United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976) (holding 6% interest rate specified in Declaration of Taking Act, 40 U.S.C. §§ 258a - 258e, to be a floor, rather than a ceiling, on interest payable on a deficiency of funds deposited at time of commencement of suit); *United States v. 319.46 Acres of Land*, 508 F.Supp. 288 (W.D. Okla. 1981).

I. Gap Between Valuation and Passage of Title.

The Fifth Circuit's denial of interest to Kirby produces a result totally contrary to the well-established rule that the Fifth Amendment requires that the owner of property receive the full equivalent of its value as of the date of taking.[18] Although Kirby's property was valued

18. *United States v. Dow*, 357 U.S. 17 (1958); *United States v. Reynolds*, 397 U.S. 14 (1970).

as of March 6, *1979*, the valuation award was not paid until March 26, *1982*, which the Fifth Circuit found to be the date of taking. Using the Fifth Circuit's date of taking, the payment to Kirby was based on a valuation not as of such date, but three years prior thereto. Apart from underscoring the fact that Kirby has received less than just compensation for its property, this result, if affirmed by this Court, requires that Kirby at least be afforded the opportunity, upon remand, to establish the increase in value of its property through March 26, 1982.

On this point, the Fifth Circuit stated: "The landowners have made no showing that property values have in fact risen." 696 F.2d at 356. The Court has imposed an impossible burden. How was Kirby to "make a showing" that property values had increased by the Fifth Circuit's date of taking, when payment occurred during the pendency of this case before the Fifth Circuit? The only hearing for valuation purposes had occurred three years previously. Although at the hearing on objections before the District Court, counsel for both parties referred to the need for evidence as to valuation at a later date, the District Court's interest award mooted the question. Kirby has in fact had no opportunity to present evidence as to increase in value through the date of taking fixed by the Fifth Circuit. Should this Court affirm the Fifth Circuit as to the date of taking, the Fifth Amendment requires that Kirby be allowed to present evidence on remand as to increase in value of its property through March 26, 1982. As discussed in Point III, *supra*, the problem of an award being deposited long after the date of valuation upon which such award is based is one of the fundamental flaws of a rule holding that payment of an award and passage of title determine when a taking occurs.

II.

The Assertion By The Government Of The Power Of Eminent Domain Under 40 U.S.C. § 257 Is Properly An Element In The Taking Analysis, Requiring An Analysis Different From Police Power Cases.

As we have shown in Point I, value is to be determined at the date of taking, *United States v. Miller, supra,* the deprivation of the owner rather than the accrual of a right to the sovereign is the measure of the taking, *United States v. General Motors, supra,* and the concept of property involved in Fifth Amendment analysis is the legal relationship rather than the *res. Id.* The result of the application of such principles to this case is clear: neither possession nor passage of title nor the payment of the award can be the *sine qua non* in the taking analysis: the emphasis lies with the deprivation suffered by the owner.

Building on such principles, as an alternative approach to that taken under Point I, we urge that eminent domain cases require a separate analysis to determine the taking question. In the reported cases, the taking question arises most frequently in police power or inverse condemnation situations. This Court has announced, essentially beginning with *Pennsylvania Coal Co. v. Mahon,* and carrying forward to the recent *Penn Central* and *Agins* cases, that the analysis to determine the balance between the regulatory power and the right to compensation for governmental takings depended on the facts of each case, principally because of the varying degrees of interference found in the different cases. This case, arising under the exercise of the power of eminent domain, while referring to principles announced in police power cases, does not depend upon the same analysis. With the assertion of the power of eminent domain, the government purports to exercise

a power different from the regulatory power, and to accomplish different results. We are speaking of a difference in kind and not one of degree when we speak of these distinctions.

Thus, even though the question of a regulatory taking may require an analysis based upon the degree of interference, such an analysis is not necessary when an exercise of the power of eminent domain is in question. That this is so may be seen from an examination of certain conceptual distinctions between the respective powers. Thus:

1. The Government in exercising the power of eminent domain is a participant in an enterprise capacity in the process of competition among economic claims, producing benefit to the government enterprise, while in exercising the police power it is merely acting as mediator between private economic claims.[19]

2. The police power has for its object, conduct, and only indirectly affects interests in property, while eminent domain has for its object, interests in property and only indirectly affects conduct.[20]

3. The police power has for its purpose, regulation, while eminent domain has for its purpose, acquisition.[21]

4. The exercise of the police power involves, at least theoretically, no intent to take nor does it involve the assertion of a right to take, while intent to take

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19. See Sax, Takings and the Police Power, 74 Yale L.J. 36, 62 (1964).

20. See *Mugler v. Kansas*, 123 S.Ct. 623, 669 (1887).

21. See Stoebuck, p. 570.

and the assertion of the right are explicit in eminent domain.

5. As perhaps a corollary to Number 4, the expectation in the passage or implementation of a police power regulation is that no taking will occur, while in the passage of an enabling statute and in the filing of a complaint in condemnation the legitimate expectation is that a taking will result.

These distinctions, combined with the principles set forth above, clearly support a different analysis regarding the degree of "impact" which is required to support a finding of a taking in an eminent domain case.[22]

Thus, as a participant in the competition among economic claims, the Government has a vested interest in reducing the cost of its acquisitions to the minimum. It there-

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22. Such distinctions are not diminished by the fact that both powers are discussed in terms of the social contract expressed in Fifth Amendment taking and just compensation clause. Thus, that an exercise of the police power does, in fact, effect a taking does not automatically convert it to an exercise of the power of eminent domain; it merely means that the invasion or the interference has reached a level requiring compensation. The government could elect to discontinue the exercise, paying for the effects of the temporary interference; and if the interference is to continue, the compensation process is accomplished by the inverse condemnation procedure. In either event, however, the simple fact is that the government never sought to exercise its power of eminent domain, and would not be acquiring the property (if forced to acquire it) in the exercise of such power. Any acquisition would occur only as a result of an improper exercise of the regulatory power. Further, the fact that the taking clause would be brought to bear in relation to both the police power exercise and the power of eminent domain does *not* mean that they are not *sui generis*: the taking clause does not embody either power (they would exist absent the Fifth Amendment); it merely states the consequences of their exercise. The taking clause does not require that the respective powers be consistently treated and analyzed for all purposes. See *United States v. Clarke*, 445 U.S. 253 (1980).

fore has no reason not to defer payment well beyond the valuation date, to gamble on a "free ride" on the interest question. Thus while dates of takings and hence, dates of valuations, in police power cases are usually determined by ascertainable physical events (thereby preventing a free ride), no such event occurs in eminent domain cases, absent physical possession, to isolate the date for the value determination. An analysis is required which considers the vested interest of the Government and recognizes the need to pinpoint the valuation date in order to prevent a Governmental gamble on the interest question. These considerations are not present in police power cases.

Further, the expression of the intent to take—absent in police power cases—has its own deprivational effect and should therefore be present in the analysis.

As we have seen in the discussion under Point I, the intereference created by the filing of a complaint in condemnation is direct and takes from the owner all or nearly all of the benefits of ownership, leaving him with the detriments.[23] Viewing the assertion of the power of eminent domain by the Government as a special circumstance in the analysis of whether a taking has occurred, therefore, the necessity of finding the same kind or degree of interference as has been held to be a taking in police power cases disappears. Thus, where the power has been asserted, and the intent to take is clear, coupled with the rational expectation that a taking will occur, a taking may be

23. This is true whether or not the "negative restraint" analogy to a direct invasion is utilized. The filing of the complaint in and of itself is a direct invasion of the title.

found upon lesser evidence of interference in a condemnation case than in a police power case. This is so because the public assertion of the power is a direct, material burden on the legal relationship, and its presence in the analysis—based upon the emphasis to be given the deprivation of the owner—clearly lessens the need to resort to a full review of economic impact, interference with investment-backed expectations and the character of the interference.

Nor need the full impact of the Government interference have actually occurred. The final, full effect—that of divestiture—may only be prospective, but if the intent to accomplish it is clear, the assertion of the right, because it invades the property, i.e., the ownership interests, is a taking. See in this respect, *Kaiser Aetna v. United States, supra,* which held that the assertion of a navigational servitude by the Government *would result* in an actual physical invasion of the privately owned marina, i.e., that the decision in the case rested on a prospective effect which would constitute a taking. Thus the intent to accomplish the ultimate result, as evidenced by its assertion, has had decisive results in this Court. And *Kaiser Aetna* is more akin to a condemnation case than most non-condemnation situations because there the Government initiated the suit, asserting the applicability of its navigational servitude to prevent the exercise by Kaiser Aetna of its "right to exclude" ownership interest.

The result here is clear. The purpose of the condemnation was the preservation of the property *in statu quo.* This was accomplished by the filing of the complaint. Interest is due from the filing date.

III.

The Application Of 40 U.S.C. § 257 By The Government In This And Other Cases Allows Arbitrary, Inconsistent And Unjust Results Relating To The Correlation Of Valuation And Taking, Contrary To The Mandate Of The Fifth Amendment That Compensation Shall Be Just.

A question alternatively presented for decision by this case is this: may a uniform rule applicable to all straight condemnations under § 257 be fashioned to establish consistency in the determination of the date of taking?

Petitioner asserts that not only does the situation currently existing in Federal condemnations under § 257 amply demonstrate the need for a uniform rule, but that such a rule may be formulated consistently with existing principles and theories of Fifth Amendment construction.

The existing situation, to say the least, is a picture of confusion. The District Court in this case found the date of taking to be the date of the filing of the complaint, while the Court of Appeals found it to be the date of the deposit of the award. In another case involving the Big Thicket Preserve, the date of taking was found to be the date of the announcement of the award by the commissioners.[24] That case was not appealed. In the Ninth Circuit case which conflicts with the Fifth Circuit here, the Court of Appeals held that the date of taking was the date of the judgment,[25] contrary to the finding of the District Court that the date of taking was the date of the deposit of the award. In yet another case in

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24. *United States v. 59.29 Acres of Land*, 495 F. Supp. 212 (E.D. Tex. 1980).

25. *United States v. 156.81 Acres of Land, supra.*

the Ninth Circuit, involving the same project as the first case, the Court of Appeals held that the date of taking was the date of valuation,[26] apparently contrary to the District Court in that case, in view of the reversal and remand.[27]

This Court has adopted differing dates, in some cases based upon an acceptance of state procedures as being consistent with "just" compensation, see, e.g., *Brown v. United States*, 263 U.S. 78 (1923) (date of issuance of summons); and in others, *e.g., Danforth*, acceptance of a possession or payment of the compensation theory. See in this respect *Shoemaker v. United States*, 147 U.S. at 282 (1893), *Bauman v. Ross*, 167 U.S. 548 (1897) and *United States v. Rogers*, 255 U.S. 163 (1921).

Other cases dealing with the question are *United States v. Powelson*, 118 F.2d 79 (4th Cir. 1941), rev'd, o.g., 319 U.S. 266 (1943) (date of filing of the complaint); *United States v. Sargent*, 162 F. 81 (8th Cir. 1908) (date of the report of the commissioners); *Fibreboard Paper Products Corp. v. United States*, 355 F.2d 752 (9th Cir. 1966) (date of possession); *Morton Butler Timber Co. v. United States*, 91 F.2d 884 (6th Cir. 1937) (date of possession); *United States v. Certain Property, Borough of Manhattan*, 374 F.2d 138 (2d Cir. 1967) (date of possession); *23 Tracts of Land v. United States*, 177 F.2d 967 (6th Cir. 1949) (date of possession).[28]

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26. *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982).

27. No reported District Court discussion of the date of taking question has been found in that case.

28. Each of the latter cases which relies on actual possession appears to have relied, without analysis, upon cases such as *Danforth* and *Rogers*, which merely accepted the "taking means possession or accrual of title" concept, also without analysis.

The result of the existing confusion is not just that one landowner in the Ninth Circuit may be treated differently from a landowner in the Fifth Circuit. It also means that "just compensation" in cases where the Government has not entered into actual possession may depend upon the whim of Government in the selection of the means to effect its acquisition. Thus, the interest of one landowner, by the Government's choice to proceed under 40 U.S.C. § 258a,[29] may receive immediate compensation, will have the benefit of a definite date of taking, and will be entitled to interest on any difference between the deposited estimate of value and the actual award determined later. On the other hand, his neighbor, by the Government's selection of § 257 as the mode of proceeding, will not receive any money at the outset, will have the date of taking remain undetermined, perhaps for years, will suffer the likelihood of a great time disparity between date of valuation and date of taking, will receive no interest at all in the event the date of taking is determined to be the date of payment of the award, and suffers the vagaries of value fluctuations in the interval (not to mention the potential deterioration of any improvements which may exist). Both landowners were effectively denied the benefits of ownership from the date the Government began its proceedings—but one will receive just compensation (at least in theory) while the justness of compensation to his neighbor is highly problematical. Where the Government does not enter into possession, thus, just compensation in side by side cases is allowed by § 257 to be materially affected by artificial choices made by the Government.

Clearly, neither Congress nor the Executive has the right or the power to prejudice the rights of the landowner by the selection of the manner in which the Gov-

29. See Appendix A.

ernment elects to proceed to condemn private property. The determination of just compensation is a judicial function and cannot be taken away by statute or executive fiat, *Seaboard Airline Railway Co. v. United States, supra,* at p. 304; *Monongahela Navigation Co. v. United States,* 148 U.S. 312, (1893), and should not be impaired by artificial, arbitrary government choices.[30]

Perhaps the greatest vice of § 257, however, is the distortion and confusion which it allows by the failure to fix a secure date of taking. The problem inherent in straight condemnations is that the date of payment *always* follows the date of valuation. The problem occurs if the date of payment is determined to be the date of taking, as the Court of Appeals has decided here. In that event, the date of taking will *always* be subsequent to the date of valuation. This situation manifestly violates the basic constitutional premise that the owner is entitled to receive compensation based upon the value of his property *at the date of taking.* This basic proposition is so well established, see *United States v. Miller,* 317 U.S. 369 (1943); *United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938); *Jacobs v. United States,* 290 U.S. 13 (1933); *United States v. Rogers,* 255 U.S. 163 (1921); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893), that it stands as universally accepted without the necessity of further elaboration.

This vice is not cured by the allowance of interest from the date of taking, for—as here—when the date of payment is held to be the date of taking, no interest is due. To require a retrial of value questions as of a later date —in effect a new trial in every respect—is not only waste-

30. The essential purpose of the clause was to "prevent arbitrary government action", Sax, *Takings and the Police Power,* 74 Yale L.J. 36, at p. 58 (1964).

ful of the resources of all concerned, but also imposes potential prejudices—created by the arbitrary choice of the Government—which the landowner ought not to bear. The vice can be cured by the establishment of a uniform rule placing the date of taking at a time which is consistent with constitutional requirements.

The determination of the correct rule applies the same Fifth Amendment principles discussed above, that values are determined as of the date of taking, that it is the deprivation of the owner and not the accrual of a right or interest to the sovereign by which the determination of whether a taking has occurred is measured, and that it is the legal relationship concept of property, rather than the *res*, which is utilized in Fifth Amendment analysis.

The application of such principles, as we have seen under Points I and II, requires the discarding of the passage of title test in eminent domain cases.

But for yet another reason the taking concept represented by the passage of title (as established by the date of the payment of the award) must be discarded: it is a totally arbitrary event, having no relation whatsoever to the true test of a taking, the deprivation of the interest of the owner. Once it has been firmly decided that the existence, or not, of an accrual of title in the sovereign and the existence, or not, of possession by the sovereign are not conclusive in the taking analysis (except, in the latter case, where possession might occur *before* the filing of condemnation proceedings), the payment of the award becomes irrelevant except as it determines the date on which the accrual of interest on the award ends.

We have demonstrated under Point I that under current taking analysis a taking occurred here in actuality and that the interference was analogous to a direct invasion

under Michelmanian analysis; and in Point II, we further demonstrated that the particular purpose of the condemnation was a highly relevant factor in either of the taking analyses discussed under such points, i.e. that the preservation of a wilderness was the purpose of the condemnation and was accomplished by the interference against the ownership interests which resulted from the filing of the complaint. At the heart of the taking theory here suggested, however, is the assumption that the *purpose* of the particular condemnation is irrelevant, i.e. that *all* condemnations interfere with constitutionally-protected ownership interests to a sufficient degree to constitute a taking.

Thus, whether the filing of the complaint is deemed to be the equivalent of a direct invasion, or whether it is viewed as so strong a circumstance that it is a sufficient interference even if not analogous to a direct invasion, the filing of the complaint is the focal point of the governmental interference, alowing the rule to be stated as follows:

> Because in a straight condemnation (absent prior possessory acts) the filing of the complaint in condemnation is an assertion of a right and intent to take, the effect of which in every case is to impose a direct, material and adverse interference with the ownership interests in the property, and which according to legitimate expectation will result in a divestiture of title for a public use, the date of taking for the purpose of determining just compensation is the date of the filing of the complaint.[31]

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31. It should be clear that we are not suggesting that a uniform rule may be made applicable to police power cases. The rule here suggested for condemnation cases will have no effect on the exercise of other powers. There is no analogy available in a police power case to the filing of a complaint in condemnation, unless it would be to a direct invasion, which is a taking in any event.

The proposed rule is consistent with the basic principles discussed above and with the results of the cases announcing them. Thus, it establishes a date of taking which will be prior to a valuation hearing, allowing valuation testimony as of the date of taking as required by *United States v. Miller, supra,* and the other numerous authorities stating such principle. It requires the accrual of interest from the date of taking on the award ultimately determined, as is proper to constitute just compensation, as held by *United States v. Rogers, supra,* and *Seaboard Air Line Ry. Co. v. United States, supra.* It does not prevent the Government from discontinuing the action if it determines that the award is beyond its purse as suggested in *Danforth;* the rule merely requires that interest (or other damages) be paid during the period of the pendency of the proceedings as a temporary taking, in line with *Dow v. United States, supra.*[32]

Further, the rule is not inconsistent with those cases which hold that the continuation of benefits to the landowner during the pendency of condemnation prevents the finding of a taking prior to physical possession or accrual of title. *See, Shoemaker v. United States, supra.* The rule here suggested may be applied to both improved and unimproved property with equal facility. Regarding improved property, meaning property productive of income, the Government, first, has a choice: it can either take possession and assume the benefits of the property, or it can leave the benefits to the owner during the pendency of the suit. In the latter event the benefits which the landowner would continue to receive would merely be offset against the interest accruing during the pendency

32. See, in addition, the dissent of Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 658-659 (1981).

of the action. On the other hand, if the Government has deposited an estimated award, thereby preventing the accrual of interest (except on the difference, if any, between the deposit and the ultimate award), then the concept of fairness is served by allowing the owner to retain the benefits (except to the extent of any offset against interest on the difference between the deposit and the award), because the Government, having had the opportunity to appropriate the benefits to itself, should not be heard to complain that the landowner has benefitted from the Government's failure to exercise its rights.

Finally, the suggested rule should be examined in connection with 40 U.S.C. § 258a and Rule 71A, Fed. R. Civ. P.[33]

Section 258a, the Declaration of Taking Act, requires the filing of a declaration of taking and the deposit of an estimated award, at which time the title sought ". . . shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, . . ." Interest is required to be paid on the difference between the amount of the initial deposit and the final award. As is evident, the rule suggested above to be applicable to § 257 promotes the utilization of the same type of procedure as is found under § 258a. The suggested rule, however, does not abrogate § 257. The Government still has a choice between the different methods of condemnation: if under § 258a it must deposit the funds, while under § 257 it may defer the intial deposit, or not deposit any compensation at all until after the determination of the final award. What the rule does, however, is announce to the Government that the system which § 257 allows does not pass constitutional muster.

33. See Appendices A and B hereto, following page 50.

insofar as it leaves the determination of the date of taking open to be influenced by artificial and arbitrary events or determinations. § 258a is not subject to that vice.

Rule 71A is the successor to the Conformity Act (former 40 U.S.C. § 258), and sets forth the procedures governing condemnation proceedings in the Federal Courts. It was intended to provide a uniformity of procedure under those acts of Congress which authorized condemnations but did not specify the procedure to be followed or allowed conformity with state procedures.[34] The Rule, however, does not purport to have any effect on the determination of a date of taking and does not require that compensation is to be deposited at any particular time, providing only, in subdivision (j) that "[the] plaintiff shall deposit with the Court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute . . ."

There is overlap, however, when considering the dismissal question. Taking subparagraph (1) and (3) together, Rule 71A allows dismissal as of right at any time prior to the hearing to determine the award, (if no possession or title has been obtained), but after that point in time dismissal is subject to court control.

The question is whether the suggested rule is consistent with the dismissal rights set forth in Rule 71A. Plainly, no inconsistency exists. Thus, assuming the government has not taken possession, it may dismiss as of right if it has not "acquired the title or a lesser interest." No title is "acquired" under the taking theory posed here—it is merely the effect on title which is the taking. If the Government dismisses prior to the value hearing and has

34. See Original Report of Advisory Committee on Rules, Par. 2.

not taken possession, under the rule here suggested the Government would be liable for the "damages" caused by the interference resulting from the pendency of the action, which might be recovered by any of several measures, whether by interest (upon a showing of value) or rental value or other compensatory measure. If possession is assumed, dismissal may not occur as a matter of right, in any event, and the Court is required to award compensation for the possession. If after the hearing on value the Government elects to dismiss, it must pay compensation for any possession and, under the rule here suggested, may be required to pay interest on the amount of the award (assuming no prior deposit). No title or lesser interest is "taken" under the rule suggested here. Thus the suggested rule and Rule 71A would operate together without conflict.

CONCLUSION

It is manifest, from the foregoing argument, that Kirby suffered a taking of its property long before the payment of the award. Irrespective of which road to decision is adopted by this Court, whether (1) the application of existing taking analysis to the circumstances of this case, (2) the application of a separate eminent domain taking analysis to the circumstances of this case or (3) the announcement of a general rule applicable to all straight condemnations, the result is the same. Kirby is entitled to interest from the date of the filing of the complaint (or, in the event the stipulation is enforced, from the date of the hearing before the commissioners).

Upon remand, based upon a holding that the date of taking preceded the payment of the award, the District Court should be instructed to apply a market interest rate from the date of taking determined by this Court.

In the event the decision of the Fifth Circuit is affirmed, the instructions upon remand should require the District Court, either itself or by reference to the Commission, to hold additional hearings for the purpose of determining increased value through the date of taking. It is hoped that this wasteful "double trial" will not be ordered by the Court.

Respectfully submitted,

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APPENDIX A

§ 258a. *Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure*

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is

specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

APPENDIX B

Rule 71A. *Condemnation of Property*

(a) *Applicability of other rules*

The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) *Joinder of properties*

The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) *Complaint*

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all per-

sons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) *Process*

(1) *Notice; delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defend-

ant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of notice*

(i) *Personal service.* Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) *Service by publication.* Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be

served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) *Appearance or answer*

If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) *Amendment of pleadings*

Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) *Substitution of parties*

If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) *Trial*

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of

that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) *Dismissal of action*

(1) *As of right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff

and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By order of the court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) *Deposit and its distribution*

The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) *Condemnation under a State's power of eminent domain*

The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) *Costs*

Costs are not subject to Rule 54(d).

(Added Apr. 30, 1951, eff. Aug. 1, 1951, and amended Jan. 21, 1963, eff. July 1, 1963).

APPENDIX C

United States of America,
Plaintiff,

v.

Certain Lands in Eastham, Truro and Wellfleet,
County of Barnstable, Commonwealth of
Massachusetts, et al,
Defendants.

ORDER

May 28, 1982

CAFFREY, Ch. J.

In each of the above-captioned tracts the issue of ownership of the tract has been resolved by the Court and the valuation of each individual tract has been determined by a trial before the three Commissioners appointed by this Court to value tracts taken by the government for the Cape Cod national Seashore. Subsequent to the filing of the findings of the Commissioner, the United States, for circumstances obviously beyond the control of the United States Attorney for the district or the Assistant United States Attorneys who have been representing the United States in this litigation, has failed to pay the landowners the amount determined by the Commissioners to constitute just compensation for the taking.

The owners of the land taken have now filed motions for the payment of interest on the condemnation awards made for each of the above-referenced tracts. The motion has been opposed by the government and has been briefed and argued by the parties.

It requires no great legal scholarship for a person to realize that the government's power to take private property by eminent domain is subject to the Fifth Amendment to the Constitution of the United States which in turn requires that there be no taking of property by the sovereign without due process of law. It likewise requires no scholarship to understand that due process of law carries with it the obligation on the sovereign to make payment to the private citizen within a reasonable time after the taking by eminent domain.

In the instant case, the conduct of the Department of Interior in connection with the establishment of the Cape Cod National Seashore has been a classic example of the denial of due process to those persons whose land has been taken. The land has effectively been tied up for Federal Government purposes since Congress in 1961 enacted Public Law 87-126, Sec. 4(d), codified at 16 U.S.C. § 4596-3(d). That statute created the Cape Cod National Seashore, and shortly thereafter *lis pendens* were filed in the Barnstable Registry of Deeds concerning most of the tracts involved. Since that time the landowners have been unable to sell their land or do much of anything with it other than pay municipal taxes thereon.

The Supreme Court of the United States in a number of decisions has ruled that the Fifth Amendment requires the payment of interest to landowners whose land is taken but not promptly compensated for. *See Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923) and *United States v. Rogers*, 255 U.S. 163 (1921). The validity of those decisions, both filed in the 1920's, has been reaffirmed by the Supreme Court in *United States v. Klamath Indians*, 304 U.S. 119 (1938) and such cases as *Albrecht v. United States*, 329 U.S. 599 (1946).

The validity of the ruling that the government has an obligation to pay interest to the landowner when the government has been tardy in making prompt payment for the taking of private property has been recognized in *United States v. 106.64 Acres of Land*, 264 F.Supp. 199 (D. Neb. 1967) and more recently in *United States v. 59.29 Acres of Land*, 495 F.Supp. 212 (E.D. Texas 1980).

Accordingly, I rule that the due process clause of the Fifth Amendment requires that the United States pay interest at the rate of 8% to each of the owners of the above-listed tracts from the date of the filing of the Commissioners' report for that particular tract to the date of payment of the judgment in that amount.

Andrew A. Caffrey, Ch. J.

No. 82-1994

In the Supreme Court of the United States

OCTOBER TERM, 1983

KIRBY FOREST INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether in an action for condemnation pursuant to 40 U.S.C. 257 interest should be assessed for a period prior to the date the award is paid and the government obtains title to and possession of the land.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 696 F.2d 351. The opinion of the district court (Pet. App. B1-B11) is reported at 520 F. Supp. 75.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983, and rehearing was denied on March 10, 1983 (Pet. App. Exh. C). The petition for a writ of certiorari was filed on June 7, 1983 and was granted on October 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE OF PROCEDURE INVOLVED

40 U.S.C. 257 provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. 258a provides in pertinent part:

> In any proceeding in any court of the United States * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.
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> * * * * *
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the

United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

Fed. R. Civ. P. 71A provides in pertinent part:

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

* * * * *

(i) Dismissal of Action.

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if

the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

STATEMENT

1. Although the Constitution contains no express grant of power to the federal government to take private property by eminent domain, the existence of that power is assumed in the Fifth Amendment, which conditions its exercise on the payment of "just compensation." Early decisions of this Court confirm the existence of the power as an inherent incident of sovereignty (see, *e.g.*, *Kohl* v. *United States*, 91 U.S. 367 (1875)).

The power may be exercised directly by legislative action, as for example in 16 U.S.C. 79c(b), which vests "all right, title, and interest in" certain land in Redwood National Park in the United States as of the date of enactment of the legislation, and establishes procedures for the determination of just compensation to the landowners divested. More typically, the legislation authorizing the project directs the appropriate agency to acquire lands within statutorily described areas. See, *e.g.*, 16 U.S.C. 698(c) (Big Thicket National Preserve); 16 U.S.C. 696 (National Key Deer Refuge); 16 U.S.C. 691 (Cheyenne Bottoms Migratory Bird Refuge).

The "straight condemnation" method by which public officials authorized to acquire private lands for public use may exercise the federal power of eminent domain, originally enacted in 1888, is now contained in 40 U.S.C. 257. That procedure is initiated by the filing of a complaint in condemnation, followed by a trial of the issue of just compensation, either to a jury or the court, or by a specially appointed commission (Fed. R. Civ. P. 71A(h)). Until the judicial proceedings fixing just compensation have been completed and the government has paid the judgment awarded, the landowner retains both possession of and title to the land in question, and the condemning authority has no power to control the owner's use of the property.[1]

In 1931, because of a perceived need to avoid the lengthy delays in initiating construction of federal buildings resulting from the straight condemnation procedures (H. R. Rep. 2086, 71st Cong., 3d Sess. (1930)), Congress provided an alternative procedure, currently contained in 40 U.S.C. 258a, that permits a federal official to file a "declaration of taking" in any condemnation proceeding at any time before judgment, and deposit the amount of the estimated just compensation.[2] Immediately upon the filing of the declaration of taking and the deposit, the title to the land vests in the United States; possession may thus be obtained at the time of the filing of the initial complaint, without waiting for the trial of the issue of

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[1] Although straight condemnation procedures originally were required to conform as nearly as possible to state practices (Act of Aug. 1, 1888, ch. 728, 25 Stat. 357), that provision was superseded in 1951 by Fed. R. Civ. P. 71A. See notes of Advisory Committee on Rule 71A, original report.

[2] The landowner is entitled to an expeditious distribution of the money so deposited (Fed. R. Civ. P. 71A(j)).

just compensation.[3] Under this procedure, if the judicially determined amount of just compensation is greater than the amount deposited, the government must pay the difference with interest from the date the declaration of taking is filed; no interest is due on the amount originally deposited.[4]

2. On October 11, 1974, Congress enacted Pub. L. No. 93-439, 88 Stat. 1254, establishing the Big Thicket National Preserve (hereinafter Preserve) (16 U.S.C. 698 *et seq.*), in order to save "displays of plant life found nowhere else in the United States * * * for continued scientific study and an educational and inspirational reminder to future generations" S. Rep. 93-875, 93d Cong., 2d Sess. 2 (1974).[5] The statute

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[3] In order to control appropriations, Congress has repeatedly directed the National Park Service to acquire lands by straight condemnation as a general practice, and not to file a declaration of taking without first notifying Congress. See S. Rep. 1527, 90th Cong., 2d Sess. 5 (1968); S. Rep. 93-875, 93d Cong., 2d Sess. 4 (1974).

[4] A fourth method by which the government may acquire lands, often termed "inverse condemnation," is by physical appropriation. As this Court explained in *United States* v. *Clarke*, 445 U.S. 253, 257 (1980), the subsequent landowner's suit is in truth an action to recover damages for a taking of his property without condemnation. The damages are measured by the value of the property at the time it was taken. See also *United States* v. *Dow*, 357 U.S. 17 (1958).

[5] Interest in preserving the Big Thicket National Preserve had led to studies of the area in 1965, 1966 and 1967. See S. Rep. 93-875, 93d Cong., 2d Sess. 2 (1974). The Texas Forestry Association and its members endorsed a 1967 National Park Service study that recommended a 35,500-acre Big Thicket Park, rather than the 84,550-acre preserve eventually established. As part of their endorsement for this smaller acquisition, the Association declared a moratorium on cutting of timber within the 35,500-acre area. See *Big Thicket National*

designated the "Beaumont unit * * * comprising approximately six thousand two hundred and eighteen acres" as part of the Preserve (16 U.S.C. 698(b)). That unit was described in the legislative history as "perhaps the wildest component * * * to be included in the Preserve" (S. Rep. 93-875, *supra*, at 4). It was also said that "at least the southern third of the unit is that extreme rarity—an area which has never been logged, unless a few bald cypress were removed many years ago. This inviolate condition is probably attributable to the difficulty of access across the many sloughs and fingers of swampland which penetrate the area" (*id.* at 16; attachment to letter from Department of Interior submitting bill and recommending its passage). In accordance with usual practice, the statute directed the Secretary of the Interior to acquire the lands necessary to establish the preserve (16 U.S.C. 698(c)).[6]

Park, Tex.: Hearing on H.R. 12034 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 52 (1972) (statement of Oliver R. Crawford, Vice President, Eastex, Inc.). Petitioner observed the voluntary moratorium beginning in 1967. *Id.* at 86, 88 (statement of J.B. Webster, Manager, Corporate Relations, Kirby Lumber Corp.), as did other timber companies in the area of the proposed preserve. See *Proposed Big Thicket National Reserve, Tex.: Hearings on H.R. 4270 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 209, 212-213 (1973) (statement of James R. Shepley, President of Time, Inc.).

[6] Although the House bill had provided for a legislative taking, the Senate deleted this provision; as the Senate Report noted, legislative taking is an extraordinary measure to be used only when "the qualities which render an area suitable for national park status are imminently threatened with destruction" (S. Rep. 93-875, *supra*, at 5). Given the morato-

Petitioner, "an integrated forest products manufacturer, owning timberlands * * * to supply the raw material for its manufacturing facilities" (Pet. Br. 3 n.3), owned almost a third of the land contained in the Beaumont unit of the Preserve (Pet. App. A2; Pet. Br. 3). After negotiations for purchase proved unsuccessful, the United States filed a complaint in condemnation on August 21, 1978 with a view to acquiring petitioner's 2,175.86 acres within the boundaries of the Preserve (J.A. 5-6). The action was referred to a commission for the ascertainment of the amount of just compensation due petitioner (J.A. 1).

On March 6, 1979, the opening day of the trial before the commission, the parties stipulated that "today is the date of taking" (J.A. 17). The witnesses, the parties and the commission evidently understood that the fair market value of the property was to be determined as of that date (III Tr. 604; V Tr. 154; see Memorandum for the United States at 3). At trial, petitioner's Senior Vice President testified that petitioner had no present intention of logging in the area, which had been considered by the company to be a "reserve logging area" at least since the early 1950's (I Tr. 52).

On March 3, 1980, the commission entered its report recommending an award of just compensation of $2,331,202 (Pet. App. B1). Both the United States and the petitioner promptly filed objections in the dis-

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rium, the availability of the declaration of taking procedure "should any particular area within this Preserve be threatened" (*ibid.*), and the traditional prompt congressional response to notice of the intent to file such a declaration (see note 3, *supra*), the Senate concluded that it was preferable to avoid a legislative taking that "would require the United States to pay interest computed from the time of taking until the date of final payment" (S. Rep. 93-875, *supra*, at 6). The statute was enacted without the legislative taking provision.

trict court to the commission's report (Pet. App. A2). A hearing on both parties' objections was held in January 1981, and on August 13, 1981, the district court entered judgment (J.A. 21-23) awarding petitioner just compensation in the amount recommended by the Commission plus interest at the rate of six percent from August 21, 1978—the date the complaint in condemnation was filed—on the theory that the property was taken on that date, because institution of the condemnation proceedings "effectively denied [petitioner] economically viable use and enjoyment of its property" (Pet. App. B10). The United States deposited the amount of the judgment, including interest as assessed, in the registry of the court on March 26, 1982 (J.A. 27).

4. Both parties appealed (Pet. App. A2).[7] The court of appeals reversed the district court's award of interest, Judge Jolly dissenting.[8] Relying on this Court's decisions in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980) and *Danforth* v. *United States*, 308 U.S. 271 (1939), the court of appeals held that "the mere commencement of straight condemnation proceedings, where the government does not enter into possession during those proceedings, does not constitute a tak-

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[7] The instant case was consolidated on appeal with another case involving condemnation of another tract for the Big Thicket National Preserve that also raised the question of the payment of interest in straight condemnation cases. The second case, *United States* v. *13.32 Acres of Land*, C.A. No. 81-2471, is not before this Court.

[8] Responding to objections by both parties, the court of appeals unanimously remanded the case to the district court for further proceedings because of the inadequacy, under this Court's decision in *United States* v. *Mers*, 376 U.S. 192 (1964), of the report of the commission (Pet. App. A12).

ing" (Pet. App. A6). Because the government here had not entered into possession or substantially interfered with the use of the petitioner's property, the court determined that the date of taking was the date of the payment of the award when title passed to the government (Pet. App. A11). Noting that the stipulation concerning the "date of taking" at the opening of trial "did not deprive the owners of the enjoyment of their lands, nor did it give the government any interest in those lands" (Pet. App. A9), the court of appeals (like the district court) read the stipulation as simply an agreement as to the date of valuation.

The majority of the court refused to follow the decision of the Ninth Circuit in *United States* v. *156.81 Acres of Land*, 671 F.2d 336 (1982), cert. denied, No. 82-552 (Dec. 13, 1982),[9] which held that, when the condemned property is unimproved, interest in straight condemnation cases is due from the date the judgment is entered until the award is paid and the title taken.[10] Rejecting the rationale of that decision, the court noted that "[w]hether or not the property is improved, the judgment in condemnation does not deprive the landowner of a present use. The rented property continues to provide rent; the wilderness property continues to provide recreational uses" (Pet. App. A10).[11]

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[9] See also *United States* v. *15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert. denied, No. 82-1333 (Mar. 21, 1983)).

[10] Judge Jolly found that decision persuasive (Pet. App. A14-A15).

[11] The court also rejected petitioner's argument that the award of interest would compensate it for a possible increase in the value of the property between the date of valuation and

SUMMARY OF ARGUMENT

The owner of property that is taken by eminent domain is entitled to just compensation, which is the fair market value of the property at the date of taking contemporaneously paid in money. When the taking precedes full payment, interest on the unpaid amount is due from the date of taking to the date of payment to compensate for the delay. Interest simply makes up for the loss during the period of the delay, of the use of the money awarded. It is not intended to reflect any increase in the value of the property that may have occurred either before or after the date of taking, because the respective rights of the government and the landowner became fixed at that date.

Attempts to correct perceived injustices to landowners arising out of the condemnation process through adjusting the dates when property will be assumed to have been taken are inconsistent not only with established principles of eminent domain, but also with congressional intent, as reflected 1) in the existence of a statutory alternative to straight condemnation that specifically permits the government to accomplish a peremptory taking of private property, 2) in congressional directives to the Park Service to use the special taking authority only in emergency situations, and 3) in Fed. R. Civ. P. 71A, which permits the dismissal of a condemnation action before the property is taken by the payment of the award. This Court's decisions have also recognized that in a straight condemnation suit, the taking oc-

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the payment of the award, finding "no reason to award interest on the basis of speculation" (Pet. App. A9); here, where "[t]he dates of judgment and payment * * * were relatively contemporaneous," the court found no evidence that "the earlier valuation date [was] unjust" (Pet. App. A10).

curs when the award is paid, and fluctuations in value in the course of the proceedings before that time do not constitute takings in the constitutional sense.

Of course, a taking may occur before the payment of the condemnation award if the government exercises dominion and control over the property, either by entering into possession or by appropriating some substantial interest in the property to its own use. No such appropriation occurs in the typical straight condemnation suit, of which this case is a good example. Neither the legislative decision to acquire the land, the filing of the condemnation suit, nor the entry of the judgment on the condemnation award is such an exercise of governmental control over the property (whether or not the property is improved or producing current income) that it constitutes a taking under this Court's decisions.

The rule is not unfair to the owners of land subject to condemnation. The desirability of any particular date of taking to any particular landowner will depend on the vagaries of the market value of that type of land. If it is assumed that land prices in general rise over time, the interest of landowners normally will be served by having the valuation date—and thus the taking date—delayed as long as possible. Because of the difficulties of predicting land values at an unknown future date, the valuation date in the typical straight condemnation case is the date of trial, rather than the date when the property is subsequently taken. But if there is a substantial delay between the valuation date and the taking date, and if the value of the property increases during that delay so that the condemnation award no longer represents just compensation on the date of taking, the landowner's remedy is to obtain a determination of the current market value of the land, not to seek the

award of interest from some hypothetical date of taking.

Alternatively, if governmental actions outside the scope of the proceeding and before the property is taken adversely affect the possession and use of the property, the landowner's remedy is a suit for injunction against those extrajudicial activities or perhaps for recovery for inverse condemnation.

ARGUMENT

I. THE AWARD OF INTEREST FOR ANY PERIOD BEFORE TITLE OR POSSESSION PASSES TO THE GOVERNMENT WOULD BE CONTRARY TO THE INTENT OF CONGRESS AND ESTABLISHED JUDICIAL PRECEDENT

The decision below correctly applies established principles governing the determination of just compensation in straight condemnation cases; it is entirely consistent with congressional intent, as reflected in the various statutes and congressional directives relating to condemnation, and with the rulings of this Court.

The landowner is entitled to the fair market value of the land paid contemporaneously with the taking, and interest on any amount not so paid from the date of taking to the date of payment. Petitioner does not dispute this fundamental principle of the law of eminent domain (Pet. Br. 10). Nevertheless, although he pitches his argument on a discussion of when a "taking" occurs, his underlying thesis—that it is somehow unfair to deny interest in the typical straight condemnation case, where the government acquires neither title nor possession before it pays the compensation award—turns on a confusion between the concepts of fair market value and interest. The two concepts are in fact quite distinct, although both are elements of just compensation.

The compensation to which a landowner is constitutionally entitled is that which is the equivalent of the property "paid contemporaneously with the taking" *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923); accord, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); cf. *Smyth* v. *United States*, 302 U.S. 329, 353 (1937). Thus, when the taking in fact occurs before the payment—for example where there is a declaration of taking under 40 U.S.C. 258a, or the government enters into possession before payment of the full amount finally awarded—an award of interest is necessary in recognition of the delay in payment.[12] Interest, which is a form of consideration for the use of money, simply recompenses the landowner for the loss of use of the award in the interim between the taking and the payment of the sum due, and the longer the delay, the greater the interest due.[13] In

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[12] Accordingly, no interest is due on amounts deposited with the court at the time of a taking pursuant to 40 U.S.C. 258a, which become immediately available to the landowner (Fed. R. Civ. P. 71A(j)). Interest is due only on that portion of just compensation, if any, later found due and owing.

[13] Because of the role of interest in determining just compensation, the United States has acquiesced in decisions of several courts of appeals that the six percent interest rate in 40 U.S.C. 258a is not a ceiling on the amount of interest that may be awarded in a condemnation suit. See *United States* v. *329.73 Acres of Land*, 704 F.2d 800, 812 & n.18 (5th Cir. 1983) (en banc) (citing cases). Thus if, contrary to our submission, interest were appropriate in this case, we would agree with petitioner (Pet. Br. 49) that a formula for interest could properly be determined on remand without regard to the statutory limitation.

contrast, the fair market value of the land may rise or drop over time, so that the desirability to the landowner of an earlier, rather than a later, date for the calculation of the fair market value will depend on the vagaries of the market place.

The date of valuation in the typical straight condemnation case should in strict logic be the date at which the government pays the award and acquires title and possession. But, as a practical matter, "it verges on the impossible to require the condemnation commissioners to ascertain the value of land as of an entirely unknown future date, which may be a few months in the future and which may be a few years in the future" *United States* v. *Crary*, 2 F. Supp. 870, 878 (W. D. Va. 1932). Accordingly, the usual valuation date is, as it was here, the date of the trial. This has the practical advantage of permitting the commission to determine current values, rather than requiring them to make adjustments for past or future valuations (2 F. Supp. at 879) while also providing the closest feasible date to the date of actual taking.[14] If the value of the land in fact rises significantly during any delay between the trial and the date the actual taking occurs, the landowner is entitled to a

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[14] Of course, if there is either a declaration of taking or an entry into possession before the trial, that date establishes the date of taking and the date of valuation. Although petitioner suggests that the cases present "a picture of confusion" (Pet. Br. 40-41) as to the date of taking, the cases he cites largely deal with situations in which there was an entry into possession or, as in *United States* v. *Powelson*, 118 F.2d 79 (4th Cir. 1941), rev'd on other grounds, 319 U.S. 266 (1943), a declaration of taking (see 319 U.S. at 268). The other cases on which he relies followed state procedures regarding the date of taking pursuant to Act of Aug. 1, 1888, ch. 728, 25 Stat. 357, before the enactment of Fed. R. Civ. P. 71A. See note 1, *supra*.

recomputation of fair market value.[15] The landowner is not made whole by an award of interest.

A. The legislative scheme provides for alternative dates of taking of condemned land

In refusing to find a taking until the judgment was paid, the court below conformed to the evident congressional intent, as reflected not only in the distinction between 40 U.S.C. 257 and 40 U.S.C. 258a, but also in Fed. R. Civ. P. 71A and in its repeated directions to the Park Service to avoid taking in advance of judgment, except when necessary to preserve the character of the property taken by the filing of a declaration of taking.

The declaration of taking authority in 40 U.S.C. 258a was granted in 1931 to provide a more expeditious procedure for the construction of federal buildings on condemned land, in large part in order to stimulate employment during the Depression (H.R. Rep. 2086, 71st Cong., 3d Sess. (1930); 74 Cong. Rec. 777 (1930) (remarks of Reps. Graham and Stafford); *id.* at 779 (remarks of Rep. LaGuardia)). Although there had been some questions concerning the constitutionality of a procedure in which the taking precedes the payment, those questions were laid to rest in *Sweet* v. *Rechel*, 159 U.S. 380 (1895); thus the House Report on the Declaration of Taking Act asserted that the constitutionality of the proposed procedure was established (H. R. Rep. 2086, 71st Cong., 3d Sess. 1 (1930)).[16]

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[15] The government is similarly entitled to a recomputation if the value of the land drops in the interim.

[16] Petitioner's suggestion (Pet. Br. 43-44) that the traditional straight condemnation method poses constitutional problems precisely because payment and taking are simultaneous is flatly inconsistent with this history. Indeed, 40 U.S.C. 257 is a statutory enactment of a type of eminent domain proceed-

The new procedure was not intended to replace the traditional straight condemnation procedures. See 40 U.S.C. 258d (power to take by declaration not to abrogate, limit or modify any other condemnation power granted by federal or state law).[17] The authority granted by Section 258a is today reserved for the situation in which a prompt taking is necessary in order to preserve the interests to be served by the condemnation. For example, in establishing the Big Thicket National Preserve, Congress directed the Secretary of the Interior to "file a declaration of taking in the usual manner * * * should any particular area within this Preserve be threatened" (S. Rep. 93-875, *supra*, at 5-6).[18] Congress thus recognized for this

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ing that was used by the states from the beginning. See, *e.g., Garrison* v. *City of New York*, 88 U.S. 196, 204 (1874) (state constitution prohibits a taking before payment, except in emergencies); *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890) (noting that although several state constitutions require that payment precede taking, Fifth Amendment does not). It thus is frivolous to assert that 40 U.S.C. 258a, enacted in 1931 to meet special federal concerns, provides the only procedure that accords constitutionally adequate protections to the landowner.

[17] Indeed, the Declaration of Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding ancillary or incidental to suits brought under other statutes. *United States* v. *Dow*, 357 U.S. 17 (1958). Resort to the declaration of taking procedure is strictly optional with the Government. *United States* v. *Catlin*, 142 F.2d 781 (7th Cir. 1944).

[18] In establishing other wilderness areas, Congress has similarly directed the Secretary to file declarations of taking only after notifying Congress of the emergency conditions justifying such actions. See, *e.g.*, S. Rep. 1597, 90th Cong., 2d Sess. 5 (1968). Congress is sensitive to the extra expense involved

project that straight condemnation is the expected procedure, and a declaration of taking the exceptional one. The district court (Pet. App. B10-B11) and petitioner (Pet. Br. 47) essentially reject that proposition. Instead, petitioner asks this Court to rule that in straight condemnation, as in a declaration of taking under 40 U.S.C. 258a, the taking occurs when the complaint is filed (Pet. Br. 45).[19]

Because there is no taking in a straight condemnation action until the judgment is paid, Fed. R. Civ. P. 71A(i)(3) permits the dismissal of the action by order of court at any time before "compensation * * * has been determined and paid," so long as the condemnor has not taken possession or "title or a lesser interest."[20] This provision is consistent with this

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when interest must be paid from the date of immediate taking (S. Rep. 93-875, *supra*, at 6).

[19] Although petitioner asserts (Pet. Br. 47) that his proposal retains some difference between the procedures under 40 U.S.C. 257 and 258a, that difference is only that, he alleges, no deposit of funds would be required at the time of taking under Section 257. He thus apparently contemplates that under Section 257 the date of taking would be a hypothetical date, at which neither possession nor compensation passed. That is flatly inconsistent with the basic concept of a taking, which means precisely the date at which the rights to possession and payment accrue. In any event, petitioner's proposal overlooks the clear statutory distinctions in the procedures under the two statutes.

[20] The reference to "title or a lesser interest" evidently reflects the possibility that the interest being acquired may be less than full title. It also provides for the situation in which the condemnor's actions may have affected the landowner's right to use or possession of the property to such an extent that the condemnor has in fact taken a partial interest in the property. In that case, an award of just compensation measured by the value of the interest taken, might be appropriate on an inverse condemnation theory. See pp. 35-36, *infra*.

Court's explanation of the effect of the award in a straight condemnation action in *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) (footnote omitted):

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost.

Cf. *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1946); *Brown* v. *United States*, 263 U.S. 78 (1923). Rule 71A accordingly permits the sovereign to withdraw after determining the cost of the property, precisely because there has as yet been no taking.[21]

While it has been careful to protect the government's interests by providing alternative methods of condemnation, Congress has not ignored the burdens that the exercise of the power of eminent domain imposes on landowners and others affected by the taking. In the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, it has carefully delineated the procedures to be followed in order "to assure consistent treatment of owners * * * and to promote public confidence in Federal land acquisition practices" (42 U.S.C. 4651). For example, federal agencies are directed to "make every reasonable effort" to acquire

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[21] In addition, Rule 71A (i) (1) permits the sovereign to dismiss the action as of right before the hearing to determine compensation if it has not entered into possession, or acquired title or lesser interest. This provision is also inconsistent with the theory that the property is taken at any point before the hearing.

property by negotiation rather than condemnation (42 U.S.C. 4651(1)); to pay the agreed purchase price, deposit the appraised fair market value with the court pursuant to 40 U.S.C. 258a, or pay the full amount of the condemnation award before requiring the owner to surrender possession (42 U.S.C. 4651 (4)); and to institute formal condemnation proceedings in order to exercise the power of eminent domain, rather than relying on inverse condemnation (42 U.S.C. 4651(8)). Moreover, Congress has directed the court having jurisdiction over a condemnation proceeding that is either dismissed or abandoned to award the landowner a sum sufficient to reimburse him for "his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings" (42 U.S.C. 4654(a)). As this Court has emphasized, however, "such compensation is a matter of legislative grace rather than constitutional command" *United States* v. *Bodcaw Co.*, 440 U.S. 202, 204 (1979). Congress has not provided for the payment of interest before taking.

B. This Court's decisions confirm that the taking occurs when the straight condemnation award is paid

If the policies underlying the power of eminent domain and the legislative enactments relevant thereto left any doubt that the taking in the normal straight condemnation case occurs when the judgment is paid on the award, that doubt would be laid to rest by *Danforth* v. *United States*, 308 U.S. 271 (1939). In *Danforth* this Court concluded (308 U.S. at 284) (footnote omitted) that "[u]nless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the

taking in a condemnation suit * * * takes place upon the payment of the money award by the condemnor. No interest is due upon the award." In applying this principle in *Danforth*, the Court rejected the argument that the government "in actuality" took a flowage easement in the land involved either when Congress passed the Flood Control Act that authorized the condemnation or when the government built levees as part of the project, even though these actions had, as a practical matter, reduced the landowner's ability to use or sell his land. The Court instead held that the reduction in the value of the land, like other changes in value that are incidents of ownership, "cannot be considered as a 'taking' in the constitutional sense" (308 U.S. at 285). This Court has recently reiterated the teaching of *Danforth* in *Agins* v. *City of Tiburon*, 447 U.S. at 263 n.9. ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, * * * cannot be considered as a 'taking' in the constitutional sense".) Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (no taking where statute forbids sale of property).

Petitioner's attempts to distinguish *Danforth* are unavailing. *Danforth* has not been—and should not be—limited to its special facts (see *Agins* v. *City of Tiburon*, 447 U.S. at 263 n.9; *United States* v. *156.81 Acres of Land*, 671 F.2d at 338; *United States* v. *Dow*, 357 U.S. 17, 27 (1958)).[22] There is no merit

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[22] Petitioner argued unsuccessfully below (Pet. App. A8) that *Danforth* applies only to takings under the Flood Control Act, and suggests here (Pet. Br. 18) that the statute involved there "differ[s] markedly" from the instant one. This is incorrect. The easement in *Danforth* was obtained in furtherance of a general plan to control flooding in the Mississippi Valley and was specifically authorized by the Flood Control

to petitioner's apparent suggestion (Pet. Br. 22) that where the purpose of the condemnation is to preserve the area as a wilderness, the property is "appropriated to public use" simply because it is preserved in its original condition. Under that theory, there is *no* point at which the taking could be said to occur, as the preservation continued throughout petitioner's ownership of the land, and back through recorded time. The only possible point of taking under that analysis would be the date of enactment of the legislation establishing the Preserve, and *Danforth* clearly precludes the use of that date: "The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropria-

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Act of 1928, ch. 569, §§ 1-14, 45 Stat. 534-539, 33 U.S.C. 702a-702m. That statute provided that the Secretary of War was to "cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which * * * are needed in carrying out this project" (§ 4, 45 Stat. 536, 33 U.S.C. 702d). No date for acquisition of the properties needed for the project was specified, and the Act made applicable the "provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918" to the acquisition process itself (§ 4, 45 Stat. 536). Section 5 of the River and Harbor Act, 40 Stat. 911 (like the current 40 U.S.C. 258a), allowed the United States, upon the filing of a petition and "deposit of moneys or other form of security" to take immediate possession of property condemned. However, the United States did not proceed, in *Danforth*, to condemn the property in this fashion; rather, the United States took Danforth's property by straight condemnation, "upon the payment of the money award" 308 U.S. at 284. The procedure used by the government in *Danforth* is exactly the process by which property is taken under 40 U.S.C. 257; clearly, *Danforth* established a rule applicable to straight condemnation proceedings generally.

tions may fail" (308 U.S. at 286) (footnote citing cases omitted).[23]

II. NO TAKING OCCURS BEFORE TITLE PASSES IN A TYPICAL STRAIGHT CONDEMNATION SUIT

Because of a perceived unfairness to the landowner resulting from delays either from the enactment of the legislation establishing the federal preserve or from the entry of judgment in the condemnation suit to the date the judgment is paid and possession and title pass to the sovereign, the district court, the dissent below, and petitioner propose a variety of alternative points at which they contend the "taking" occurs and the right to interest accrues.[24]

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[23] Petitioner also disputes (Pet. Br. 22) the court of appeals' conclusion (Pet. App. A8) that Danforth, whose lands were actually flooded, suffered more injury, and thus more nearly a taking, than petitioner. As petitioner notes, the Court pointed out that Danforth's land would have been flooded by the unusual high water of 1937, whether or not the set back levee had been constructed, but the Court also referred to "the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee" as "incidental consequences" of the construction of the levee that did not amount to a taking (308 U.S. at 286-287). There are no such "incidental consequences" to petitioner here, who voluntarily agreed to a timbering moratorium proposed by the local forestry association (see note 5, *supra*), and whose purpose with regard to the land condemned for the Beaumont unit, since long before enactment of the Big Thicket National Preserve legislation was simply to hold the land as a "reserve." There is absolutely no indication that, absent any governmental action at all, petitioner would have decided that it wished to cut the largely inaccessible timber in the reserve. See pp. 7-8, *supra*.

[24] It is far from clear that those proposing the alternative "taking" dates recognize that those dates would then also

Although the House bill establishing the Big Thicket National Preserve proposed that the Preserve be established by a legislative taking of the land, the Senate rejected that approach (S. Rep. 93-875, *supra*, at 5), and petitioner evidently does not contend that there was such a taking here (Pet. Br. 16-17). There has never been a declaration of taking as authorized by 40 U.S.C. 258a, nor did the government ever take possession of the property before it paid the judgment and acquired title on March 26, 1982. Petitioner does not dispute these assertions, which are in any event clear from the record.[25] It is also clear that the traditional straight condemnation procedure contemplated by 40 U.S.C. 257 is in essence a forced sale by the landowner to the government, at which the purchase

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establish the date at which the fair market value must be determined. The question does not arise in this case, because of the stipulation as to the valuation date. However, to the extent that the perceived unfairness is based on the assumption that the market value of land necessarily increases over time (but see pp. 34-35, *infra*), the earlier taking dates would be disadvantageous to the landowner, because they would require that his property be valued at that earlier time. Any other rule would require the government not only to pay the higher valuation, but also interest on that higher valuation back to the date of taking, when the property was worth less. Such double recovery is hardly compensation that is "just" to the public. See *United States* v. *Commodities Corp.*, 339 U.S. 121, 123 (1950).

[25] In an affidavit attached to the government's memorandum in opposition to the petition for rehearing, the project manager responsible for acquisition of land in the Big Thicket National Preserve explained the care taken by federal personnel to obtain petitioner's consent before entering its land for any purpose before March 26, 1982 (Jewell Affidavit at 2-4). We are lodging a copy of this Affidavit with the Clerk of this Court.

price is judicially determined, and then the purchase is made by the exchange of the established price for the title to the property (see, *e.g.*, *Danforth* v. *United States*, *supra*). Accordingly, any "taking" that occurred here before title passed could only have been an actual seizure by the government of petitioner's property, for which he is entitled to an award measured by the value of the interest taken—*i.e.*, an "inverse condemnation" (see *United States* v. *Clarke*, 445 U.S. at 257-258).[26]

No such taking occurred here, nor is it appropriate to establish a general rule for straight condemnation cases of the sort proposed by petitioner or by the dissent below, which will impute such takings to the government.[27] Rather, the collateral consequences of the pendency of the condemnation action are simply incidental effects of the government's exercise of the power of eminent domain. Such incidental effects are not Fifth Amendment "takings." *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923); *United States* v. *Grand River*

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[26] Because the district court has jurisdiction to award damages against the United States only on claims not exceeding $10,000 (28 U.S.C. (& Supp. V) 1346), all other inverse condemnation actions would have to be brought in the Claims Court (28 U.S.C. (Supp. V) 1491). To the extent that the district court's award of relief to petitioner is based on an inverse condemnation theory (Pet. App. B8), it exceeded its jurisdiction.

[27] Any such general rule would be flatly inconsistent with congressional directives in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which specifically directs federal agencies *not* to take by inverse condemnation (42 U.S.C. 4651(8)), and enforces this direction by requiring that the property owner's costs, including attorneys' fees, shall be paid when compensation is awarded on an inverse taking theory.

Dam Authority, 363 U.S. 229, 236 (1960). Cf. *United States* v. *Bodcaw Co.*, 440 U.S. at 203. ("One principle from which [this Court] has not deviated is that just compensation 'is for the property, and not to the owner,' " quoting *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893).)

A. There is no constitutional taking on the date the complaint in condemnation is filed

Petitioner's primary claim is apparently that the date of the filing of the complaint in condemnation should be the date of taking (Pet. Br. 45).[28] But that

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[28] Petitioner also relies on the stipulation entered at the valuation hearing (p. 8, *supra*) as establishing the date of taking (Pet. Br. 6-7, 31-32). This claim was correctly rejected by both courts below (Pet. App. B3, A8-A9). As the court of appeals concluded (Pet. App. A9), "[t]he stipulation did no more than establish a date from which the value of the property could be determined"; that was all the commission was concerned with, and all the parties were interested in addressing at that time. In referring to the "date of taking" rather than the "date of valuation," the Chairman of the Commission was simply reflecting the general recognition of the identity of the two dates, because of the principle that valuation must be established as of the date of taking—since no taking had yet occurred, or would occur at any specific date that could then be ascertained, it was necessary to stipulate to the date of valuation. That there was no intent to establish a date of taking is reflected by the parties' continued recognition of petitioner's right to retain exclusive possession of the property until March 26, 1982, when the judgment was paid (see note 25, *supra*). In any event, the stipulation did not constitute a binding determination of the date the government received actual or constructive possession of the property. *United States* v. *Mahowald*, 209 F.2d 751, 754 (8th Cir. 1954); cf. *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 289 (1917) (stipulation as to legal effect of admitted facts does not bind court); *Estate of Sanford* v. *Comm'r*, 308 U.S. 39, 51 (1939) (same).

filing did not of itself permit the government to exercise any control over the property. As the notice of lis pendens explains (J.A. 7), the institution of the suit merely showed that the government "seeks to acquire [the described property] by condemnation." In order to obtain possession or control over the property, the government would have had to file a declaration of taking, as permitted in 40 U.S.C. 258a, as well as the complaint in condemnation. This it did not do. Absent such a formal taking, the landowner in possession retains the full power to treat his property as he sees fit (see S. Rep. 93-875, *supra*, at 5-6). The institution of legal proceedings is not sufficient by itself to achieve the result sought as the ultimate outcome of those very proceedings. Acceptance of petitioner's views would leave the government with no means of determining, in advance of taking, whether the cost of the property outweighed its utility for the intended purposes (see *Danforth* v. *United States*, *supra*). It would preclude the government from moving for dismissal under Fed. R. Civ. P. 71A.

B. There is no taking on the date of the condemnation judgment

The dissent below (Pet. App. A13-A14) and the Ninth Circuit (*United States* v. *156.81 Acres of Land*, 671 F.2d 336 (1982), cert. denied, No. 82-552 (Dec. 13, 1982)),[29] concluded that for "unimproved property" (Pet. App. A14) or property that is not "income-producing" (671 F.2d at 340), the date of taking is the date of the judgment in the condemnation proceeding, on the theory that the judgment "effectively takes the condemnee's land by denying any economi-

[29] See also *United States* v. *15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert. denied, No. 82-1333 (Mar. 21, 1983) (interest due from stipulated date of valuation, more than a year before trial).

cally viable use" (*id.* at 339). This distinction between vacant or unimproved land and income-producing land does not withstand analysis. It assumes that unimproved land is necessarily held for speculative purposes, while improved land is not. But improved land may well be held with the intention of upgrading its use, and unimproved land may be held without any intention of deriving any present economic benefit from it. There is no reason why only the speculative interests of unimproved landowners merit protection.

Indeed, to the extent that interest is designed to compensate the landowner for the loss of the use of the property between the date of the taking and the payment of the award, the owner of non-productive land—who had no current income from the land before the taking, and thus lost nothing that he previously enjoyed—has a less worthy claim to interest than a particular owner of income producing property who can show that his ability to continue to gain a return on his land has been diminished by the pendency of the proceeding. Cf. *United States* v. *Holden*, 268 F. 223, 224 (N.D.N.Y. 1920).

Thus, this analysis oversimplifies the almost limitless varieties of benefits landowners may derive from their property, even if only economic benefits are considered. It is simply not true that an impending condemnation necessarily has a greater economic impact on the owner of unimproved or non-income-producing land than it does on the owner of improved property. Improved property may become difficult, or even impossible, to rent or to use at a profit once the condemnation judgment is entered. And, as the facts of this case cogently demonstrate, the landowner may derive a substantial economic benefit from holding unimproved land, even when it is not currently in-

come producing. Petitioner had held the tract involved here as a reserve logging area at least since the early 1950's—well before any congressional interest in acquiring land in the Big Thicket National Preserve developed (I Tr. 52). There is absolutely no indication in the record that petitioner had any plans to convert the area from a reserve to an active timber producing area that were frustrated by the pendency of the condemnation proceedings, let alone by the entry of judgment. Indeed, the inaccessibility of the area (S. Rep. 93-875, *supra*, at 4, 16) and petitioner's willingness to enter into a lengthy voluntary moratorium on logging in the area strongly suggest that it had no such plans, and was perfectly content to retain the area as a reserve until it received the payment of just compensation, which would enable it to substitute other property to serve the same function—a reserve in case of future need for additional sources of timber.

A general provision that the date of judgment is the date of taking for all property, whether income producing or not, would avoid the difficulties of attempting to distinguish among the numerous varieties of economic interests in land. But such a result would permit the exception to swallow the rule. As the dissent below and the Ninth Circuit recognized (Pet. App. A14; 671 F.2d at 339-340), the economic reality of the usual situation, involving income producing property, is that the owner of such property continues in possession with his enjoyment of all the benefits of that possession unaffected by the entry of judgment. The special rule for unimproved property addresses the perceived unusual needs of the owners of such property. Those unusual needs, even if they do exist (but see pp. 34-35, *infra*), do not justify a rule that would provide a windfall to the owners of income producing property. Such owners should not be

permitted both to retain the benefits of their possession of the property and also to receive additional compensation based on the assumption that they have been deprived of those benefits.

C. There was no taking on the particular facts of this case

The district court here (Pet. App. B8-B10) appears to have invoked the case-by-case approach that this Court has applied in cases involving land use planning by local jurisdictions. See, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). Under those decisions, the determination whether a given restriction on the use of property is invalid in the absence of just compensation "depends largely 'upon the particular circumstances [in that] case'" (*Penn Central Transportation Co.*, 438 U.S. at 124, quoting *United States* v. *Central Eureka Mining Co.*, 357 U.S. at 168). While such "essentially ad hoc, factual inquiries" are entirely appropriate in that context, there are serious practical difficulties with a similar method for determining the date of taking in a condemnation proceeding. As we have shown, and as petitioner concedes (Pet. Br. 10), the date of taking establishes the date of valuation, upon which the expert testimony concerning the fair market value of the property is based. That date must accordingly be clearly established at the time of trial, or the testimony is useless. If the date of taking turns on an ad hoc evaluation of the facts of the particular case, the commission must either predict the result that the appellate court will reach, or make alternate findings of fair market value for a number of possible dates of taking. The former approach runs a high risk of reversal, with the need to repeat

the entire process, if the prediction is inaccurate; the latter approach would render the condemnation trial unmanageable, as the experts attempted to testify as to alternative valuations based on various uses at various times.[30]

In any event, applying the factors summarized in *Penn Central Transportation Co.*, 438 U.S. at 124-128, there has been no "taking" here. As we have seen (p. 29, *supra*), there was here no interference with petitioner's "distinct investment-backed expectations" (438 U.S. at 124) with regard to its reserve logging area at any time before title was taken and the judgment paid, nor was there any "physical invasion by government" (*ibid.*) before that time.[31] Even assuming that there was some diminution in economic value before title and possession passed, the Court emphasized in *Penn Central Transportation Co.* that such adverse effects alone do not establish a taking (438 U.S. at 124-127). Indeed, regulations have been held not to be takings even where the impact on the owners is extremely severe. See *Andrus* v. *Allard*, 444 U.S. at 67-68 (statutory prohibition on sale of property); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees to prevent spread of disease to area's commercially valuable apple trees); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law);

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[30] It is no answer to suggest that the problem could be solved by stipulation as to the date of valuation. Since each party would be free to select among a number of possible dates the one that would provide the most favorable valuation for it, there would be small incentive for either to agree to stipulate.

[31] Since the trees continued to grow on the land, the delays actually increased the timbering potential of the land.

Hadacheck v. *Sebastian*, 239 U.S. 394 (1915) (87% diminution in value). Cf. *Danforth*, 308 U.S. at 284.

The event upon which petitioner principally relies (Pet. Br. 6, 31) to establish its claim that the government "took" its property before title passed is the establishment of a moratorium on logging in the area.[32] But petitioner has conceded that it voluntarily instituted the moratorium on its own initiative (Pet. App. A6-A7). Even though the government relied on petitioner's "promise" (Pet. Br. 6), that hardly converts the moratorium into government action constituting a taking.[33] Indeed, there is no way that the government could have enforced the moratorium so long as petitioner retained possession of and title to the land. If petitioner had at any time, either with or without advance notice to the government, decided to terminate the moratorium, the government's only recourse, if it wished to preserve the virgin timber, would have been to file a declaration of taking and take immediate possession of the property (see S. Rep. 93-875, *supra*, at 5-6). Cf. *Miller* v. *United States*, 531 F.2d 510, 513 (Ct. Cl. 1976).

In sum, as the court of appeals concluded (Pet. App. A11), this is a case in which "the government has not entered into actual possession or substantially interfered with the landowners' rights in their prop-

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[32] Because the moratorium was instituted in 1967—a full seven years before the legislation establishing the Big Thicket National Preserve was enacted—acceptance of petitioner's contentions in this regard would have the anomalous effect of establishing a date of taking long before there was any governmental action even contemplating the acquisition of the property.

[33] At the very most, it was a donation by petitioner to the government.

erty prior to payment [and accordingly] the date of taking is the date of payment." [34]

III. THERE IS NO UNFAIRNESS IN DENYING INTEREST IN A TYPICAL STRAIGHT CONDEMNATION SUIT

The district court's award of interest was based on its belief that the delays in the straight condemnation procedure are unfair to the landowner (Pet. App. B10-B11), and petitioner describes (Pet. Br. 40-44) a situation in which the landowner is the helpless victim of the arbitrary choice of the government to use straight condemnation rather than a declaration of taking. Neither perception is correct.

It is true that the period involved in the condemnation procedure may be extensive—between the time

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[34] Petitioner suggests (Pet. Br. 30-31) that the district court's assertion (Pet. App. B10) that the "condemnation proceedings instituted by the United States government have effectively denied [petitioner] economically viable use and enjoyment of its property since it is prevented from continuing its timber business" is a finding of fact, which should not have been reversed by the court of appeals because it was not clearly erroneous. For the reasons explained above, we believe that the statement was clearly erroneous. Moreover, there was certainly no evidence, and petitioner does not here argue, that its timber business was impeded, let alone prevented by the institution of the instant proceedings. Indeed, as the court of appeals notes (Pet. App. A4) petitioner conceded below "that it can find no support for the district court's position" that there was a taking when the condemnation proceeding was instituted. In any event, we note that this Court has not suggested, in its cases dealing with assertions that government actions have taken private property, that the district court's findings on the question are to be reviewed under the clearly erroneous standard. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293-297 (1981).

the government first announces its intention to take the land and the judgment in the condemnation suit, as well as between the date of judgment and payment of the award. Here, for example, the legislation establishing the Big Thicket National Preserve was enacted in October 1974, the valuation trial was held in 1979, and the commission award was entered in March 1980, affirmed by the district court in August 1981, and paid in March 1982. This passage of time, however, does not necessarily disadvantage the landowner. Where he is deriving a current benefit from the land—whether economic or otherwise—the fact that he retains possession until payment of the award usually makes the straight condemnation procedure preferable from his point of view.[35] Even where the land is unimproved and unleased, the landowner may be better off because of the delays. It often happens that land prices rise at a faster rate than would be accounted for by the payment of interest, so a delayed valuation date is more beneficial to the landowner.[36] Nor is an artificially early valuation date, well before the actual date of payment, neces-

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[35] Of course, determining whether the delay is beneficial to a particular landowner would require the court to determine his individual motivations for holding the land. A major advantage of the fair market value standard of valuation is that it avoids requiring a condemnation court to consider such particular values of the specific tract to its owner. See, *e.g.*, 1 L. Orgel, *Valuation Under the Law of Eminent Domain* §§ 14, 74-76 (2d ed. 1953).

[36] On that assumption, pre-trial delays and the use of the date of trial as the valuation date operate to his advantage. Cf. *Miller* v. *United States*, 531 F.2d 510, 513 (Ct. Cl. 1976) (legislative taking of land for Redwoods National Park designed in part "to stop land price escalation on the taking date").

sarily to his disadvantage. Thus, here, the fair market value of petitioner's timberland was calculated as of the date of the condemnation hearing in March 1979, when timber prices were at a 10-year peak, while the award was paid and the taking occurred in March of 1982, when they were substantially lower.[37]

If a landowner is in fact damaged by undue delays in a straight condemnation proceeding, he is not the helpless victim of arbitrary government action that petitioner portrays (Pet. Br. 42). Instead, he has several alternative remedies at his disposal. First, he may seek to enjoin any governmental activities that adversely affect his property. In such a suit, he could cite 42 U.S.C. 4651(8), expressing a federal policy against takings by inverse condemnation. See also *United States* v. *Central Eureka Mining Co.*, 357 U.S. at 166 n.12; *Union Oil Co.* v. *Morton*, 512 F.2d 743 (9th Cir. 1975).[38] Alternatively, if the landowner suffered damages in excess of mere collateral consequences of condemnation (see pp. 25-26, *supra*),[39] he could accept the diminution of his property rights, and sue to recover on an inverse condemnation theory. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297 n.40. In that suit,

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[37] See a graph representing timber prices for the period 1974-1983 from Vardaman's Green Sheet (App., *infra*, 1a).

[38] The fact that it is hard to see what federal actions petitioner could have sought to enjoin here simply demonstrates that in this case there was no seizure of property before the passage of title.

[39] The difficulty of making this showing and the policy against inverse condemnation strongly suggest that the injunction route would be preferable.

recovery would be based on the value of the property interest taken over the period of the delay.[40] Indeed, an award of interest may be altogether inadequate as compensation to a landowner if the government has materially impaired the landowner's use and occupancy of the property before title has passed. A landowner in such circumstances may not be made whole through the payment of interest but can only be adequately and fairly compensated through an award based on damages arising from the government's conduct. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 375 (1945).

Even if the landowner cannot establish that any governmental actions have interfered with the use of his property, he is not powerless in the face of a governmental decision to take by straight condemnation rather than by a declaration of taking. In almost all cases, he can force the government's hand, provoking either the filing of a declaration of taking in order to preserve the values for which the land is sought or abandonment of the decision to condemn. For example, here if petitioner had ended its voluntary moratorium on cutting timber in the area within the Preserve, the government would probably have promptly filed a declaration of taking. S. Rep. 93-875, *supra*, at 5-6. Similarly, in other situations in which the condemnation is sought in order to preserve wilderness areas, the government can be expected to react with a declaration of taking to actions by the landowners that seriously threaten the characteristics of the area. The government has no other way of pre-

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[40] Here, the land was inaccessible timberland during the period the condemnation was pending, on which the trees continued to grow, so the landowner did not lose any potential benefit from the land, and its inherent value did not decrease.

venting prejudicial actions by the landowner.[41] In sum, the landowner is not helpless in the face of the government decision to take his property by straight condemnation: he can in fact force the government either to file a declaration of taking or to abandon the condemnation effort.

Finally, we agree that the landowner should not be adversely affected by any delays between the entry of the judgment and the date it is paid and title passes.[42] Once the fair market value of the property has been established, the government should decide promptly whether it wishes to take it, and act on that decision.[43] But that does not mean that an award of interest is appropriate for any period of delay. Instead, if the landowner has been prejudiced because property values have increased in the interim, he should seek an adjustment in the award based on proof of the current value. Cf. *United States* v. *Clarke*, 445 U.S. at 258; *Gould* v. *United States*, 301

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[41] Contrary to the assumption of the district court (Pet. App. B10), absent such a declaration of taking there was simply no way that the government could "permit [or prohibit] the cutting of even one tree" on petitioner's property.

[42] As we have shown (p. 35, *supra*) the landowner here was not prejudiced by the delay, because the value of timberland dropped during the period between the trial and the taking.

[43] Although there was a three-year delay here between the trial and the payment of the award, the court of appeals correctly recognized (Pet. App. A11 n. 3) that that delay "was not attributable solely to the government." The commission's report was not submitted until a year after trial, and both parties filed objections to it, which were ultimately sustained by the court of appeals (Pet. App. A11-A12). The award was paid only seven months after the district court entered judgment on the amount recommended by the commission, which was the first point at which the amount of the award was established with reasonable certainty (Pet. App. A2).

F.2d 557 (D.C. Cir. 1962) (inappropriate to award interest between date of jury verdict and deposit of award in the absence of any showing that property has increased in value).[44] The court of appeals here, faced with "relatively contemporaneous" (Pet. App. A10) judgment and payment dates and no showing of a rise in the value of the property between those two dates, properly declined to award any addition to the just compensation paid.

Petitioner, perhaps recognizing this failure of proof on its part, claims (Pet. Br. 34) it lacked the opportunity to make such a showing. But there is as yet no final determination of value in this case. After the report of the commission, both petitioner and the United States filed objections, challenging not only the adequacy of the report under *United States* v. *Merz*, *supra*, but the amount of compensation determined to be due (see Pet. App. A11). The court of appeals remanded the case to the district court "for a determination of the various issues raised by the parties" (*id.* at A12). On remand, petitioner will thus have an opportunity to present evidence that the value of its property increased between the dates of valuation and taking (but see p. 35, *supra*). Only then would any additional moneys be due petitioner. They would be due not as interest, but as payment for a proven appreciation in the value of its property.[45]

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[44] Similarly, if property values drop substantially, or if the landowner takes action in the interim that decrease the value of the land—such as cutting timber—the government should be able to establish in a subsequent hearing that the fair market value has decreased at the time of taking.

[45] If there were no pending remand, a landowner who could establish that his property had significantly increased in value since the valuation date could file a motion pursuant to Fed. R. Civ. P. 60(b) seeking an increase in the just compensation awarded. A hearing on such a motion should be limited to

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1984

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the question whether, since the award, the land values had increased. It would not be necessary to reconsider the elements that went into establishing the original valuation, and, accordingly, the supplemental hearing should not be complex or lengthy.

Alternatively, if there is an unreasonable delay between the entry of judgment and the taking of the property, the landowner could move for a dismissal of the condemnation proceeding under Fed. R. Civ. P. 71A(i)(3). If that motion were granted, he would be entitled to recover his costs, including attorney fees (42 U.S.C. 4654(a)).

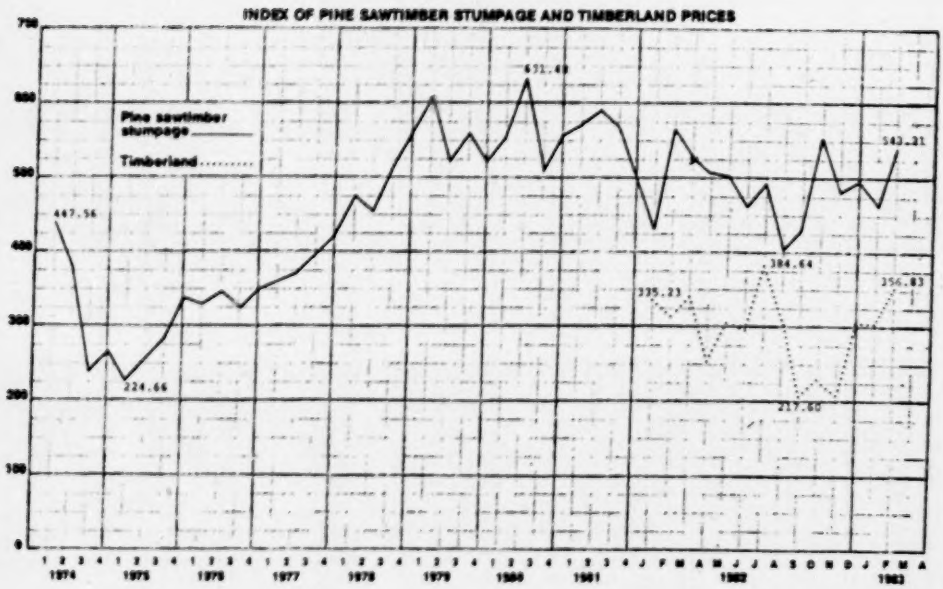
Finally, the Department of the Interior has, on occasion since early 1982, entered into negotiated agreements with owners of condemned property when, because of budgetary constraints, the Department has been unable to pay condemnation awards promptly. Where the property values are likely to increase before the date of payment and the property owner is willing to forego a supplementary valuation hearing or a motion to dismiss, the Department has agreed to make payments of "interest" on the condemnation award from 60 days after the award until title is transferred on the day of taking.

APPENDIX

VARDAMAN'S GREEN SHEET 15 JANUARY 1983

TREE TOPICS

James M. Vardaman & Co., Inc.
Forest Management Specialists
P.O. Drawer 22766
Jackson, MS 39205
(601) 354-3123



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NO. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUBJECT INDEX

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

Responding to the Brief for the United States, Petitioner respectfully submits:

1. The Government's assertion that either possession or control by the condemning authority is a prerequisite for a "taking" is contrary to the established body of law that mere interference with property rights may amount to a taking.

2. The Government's stress on Congressional intent in the taking analysis is misplaced; what a taking is and whether it has occurred are *judicial* determinations.

3. The Government's effort to turn the "just compensation" question in a condemnation action into an inverse *condemnation* question, thereby requiring the landowner to file a second suit in order to assert that a taking occurred prior to payment of the award, is a blatant attempt further to burden the landowner and the courts by requiring a multiplicity of suits.

4. The Government's contention regarding multiple valuation hearings aggravates the already present delays and points up the weaknesses of the system under § 257.

5. The Government's contention that timber-cutting is the only purpose for which the property in question was being held is contrary to the record: the District Court found that other highest and best uses were rural subdivision or recreational development.

6. The Government's position promoting self-help by landowners in order to provoke the filing of a declaration of taking is not only contrary to the intent of Congress that the wilderness should be preserved but is an alarming invitation either for on-site confrontations with preservationists or for the landowner to suffer the public consequences of despoiling the natural conditions sought to be preserved and is a subversion of the "government of laws" concept on which this Nation is based.

I. The Government's Absolutist Position on What Constitutes a Taking is Untenable.

The Government says that a taking cannot occur in a straight condemnation prior to payment of the award

unless it has, prior to such time, obtained control over the property or has, by "actual seizure," entered into possession (Brief of Government, pp. 12, 25). It equates "appropriating some substantial interest in the property to its own use" with exercising "dominion and control" (*id.*, p. 12). Other than such an actual invasion, a taking occurs, as far as the Government is concerned, *only* on "the date at which the rights to possession and payment accrue" (*id.*, p. 18, n.19).

The Government does not address, and therefore ignores:

1. Petitioner's contention that the filing of the complaint is a direct, material and adverse interference with the ownership interests in the property.

2. The substantial body of law which has firmly established that actual possession and control are not prerequisites to a taking. See *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), *United States v. General Motors Corporation,* 323 U.S. 373 (1945), *United States v. Dickinson,* 331 U.S. 745 (1947) and *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621 (1981, dissenting opinion of Mr. Justince Brennan).[1]

3. Petitioner's contention that it is the deprivation of the owner and not the accrual of an interest in the sovereign by which a taking is measured. See *United States v. General Motors Corporation, supra.*

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1. It is noteworthy that with the exception of *Penn Central, none* of the above cited cases, all of which are discussed in Petitioner's Brief, is discussed by the Government. *General Motors* is cited by the Government (p. 36), but not on any of the propositions for which Petitioner cites it.

4. The concept that a taking may be temporary, developed in Justice Brennan's dissent in *San Diego Gas & Electric, supra.* See also *United States v. Dow,* 357 U.S. 17 (1958), *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).

5. The concept that a taking may be partial, i.e. of less than full title even while the effort is being made through condemnation to take the full title (the *"de facto* taking" concept), also developed by Justice Brennan in *San Diego Gas & Electric, supra.* See also *Drakes Bay Land Company v. United States,* 424 F.2d 574 (Ct. Cl., 1970).

The failure of the Government to address such matters, which are obviously material, if not absolutely vital considerations to the decision at hand, can only mean that the Government has no basis for controverting them except by asserting the absolute and altogether unsupportable position that nothing short of actual possession, control or passage of title can constitute a taking. Such a position is obviously contrary to the existing authorities, some of which are noted above. The Government attempts to support its position, however, by reference to a so-called "legislative scheme" (Brief, p. 16). The apparent suggestion is that because Congress intends under § 257 that no taking is to occur prior to payment, that means that no taking can occur prior to payment. The absurdity of such suggestion is obvious. That Congressional intent is to achieve the acquisition by the least expensive means —although laudatory from the public's point of view— is not material to the Constitutional mandate that just compensation must be paid for the acquisition. See *Shoemaker v. United States,* 147 U.S. 282 (1893), *Albert Hanson Lumber Co. v. United States,* 261 U.S. 581

(1923), *Barnidge v. United States,* 101 F.2d 205 (8th C.A., 1939).

The only other basis suggested by the Government as support for its position is *Danforth v. United States,* 308 U.S. 271 (1939). *Danforth* has been dealt with at length in Petitioner's Brief (see pp. 18-20). In response, the Government, first, takes issue with one of the distinctions noted by Petitioner between this case and the situation in *Danforth.* Kirby contends in its Brief that the statutes underlying each condemnation "differ markedly" (Pet. Br., p. 18). The Government does not accurately interpret this ground for distinction. The condemnation authorized by the Flood Control Act in *Danforth* was not for the purpose of wilderness preservation, nor was more than a flowage easement contemplated, which would not deprive the owner of all economically viable use of his property. Here the purpose of the condemnation—the stifling of all economic use of the property—was accomplished by the negative restraint inherent in the pendency of the condemnation proceedings. The statutes are obviously different in these respects.

Second, the Government contends that no point in time can be established as a taking date where the "appropriation to public use" is said to be accomplished by the preservation of the property in its original condition (Brief, pp. 21-22). Aside from the fact that such contention is based upon the Government's myopic view of the taking issue, it is clearly contrary to the basic precept of eminent domain that one landowner should not bear the burden of the proposed governmental enterprise. To argue, as the Government in effect does, that the public benefit of preserving the property is *not* accomplished at the time

of the filing of the condemnation is to argue that such public benefit is to be borne alone by Kirby.

Third, the Government justifies *Danforth* as controlling here by contending that the effects on Kirby's property rights of which it here complains are "(m)ere fluctuations in value" and are "incidents of ownership" (Brief, p. 21). Kirby does not assert that "fluctuations in value" provide the basis for its claim. Kirby's contention is that the interference imposed by the condemnation proceeding deprived it of all economically viable uses and investment-backed expectations relating to the property, thereby subserving a sufficient number of the sticks in its property rights bundle to the interests of the public, *see Kaiser Aetna v. United States, supra,* to require a finding of a taking. These deprivations are not "incidents of ownership" or "fluctuations in value."[2]

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2. Nor are these burdens "incidental effects" of the exercise of the power of eminent domain. The cases cited by the Government for such proposition (Brief, p. 25) do not support it. Thus, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), ". . . the damage to the mine owners was incidental to the Government's lawful regulation of matters reasonably deemed essential to the *war effort* . . ." (emphasis supplied) and did not involve a condemnation. *Omnia Commercial Co. v. United States,* 261 U.S. 502 (1923), a war-time requisition case, involved a contract which the requisition terminated, but did not appropriate. It also was not a condemnation case. *United States v. Grand River Dam Authority,* 363 U.S. 229 (1960), involved a conflict between State and Federal powers, and "the frustration of an enterprise by reason of the exercise of a superior governmental power", without appropriation of "any business, contract, land or property . . ." 363 U.S., at page 236. It also did not involve the exercise of the power of eminent domain. In none of the cited cases was there involved the specific purpose of condemning the property. That which might be "incidental" to the exercise of a different governmental power loses its incidental nature (if it has such a nature) in an eminent domain proceeding, where the very purpose of the action is to take the property, and particularly where the "incidental" effect accomplishes the very purpose of the exercise of the power.

Finally with respect to *Danforth*, it must again be noted that the Government does not address the possibility here that some event or events or effects of governmental actions "in actuality" placed burdens on Kirby's property rights prior to the payment of the award. Such ostrich-like stance is a patent refusal to consider the plain holding of *Danforth* that a taking can occur prior to the payment of the award. *Danforth* does *not* hold that either possession (or "control") or the payment of the award *must* occur in order to find a taking in a straight condemnation case. *Danforth* therefore does not support the absolute position taken by the Government.[3]

The Government's position regarding the necessity of "control over the property" in order to find a taking leads it to the further conclusion (Brief, p. 27) that "(t)he institution of legal proceedings is not sufficient by itself to achieve the result sought as the ultimate outcome of those very proceedings." It then asserts that Petitioner's contention would deprive the Government of its opportunity to determine the price and would prevent it from dismissing the action under Rule 71A, Fed. R. Civ. P.

Neither such result occurs under Petitioner's contention. The Government simply refuses to consider the temporary taking concept, which is at the heart of Petitioner's proposal that a taking requiring compensation can occur without passage of title, i.e. without accomplishing the "ultimate outcome of those very proceedings." The "horribles" suggested by the Government simply do not come

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3. As for "control," if the Government wants to exert it at the outset of the proceedings, under the analyses proposed by Kirby, it would be entitled to do so. The onus of the decision of whether to complete the taking should be on the Government and not the landowner.

about. As explained at length in Petitioner's brief (see Pet. Brief, pp. 48-49), the Government at all times prior to payment of the award and passage of title maintains the right to dismiss (which is its right if the price is not acceptable), which Petitioner does not dispute, subject to the payment of just compensation for any temporary or partial taking, and subject to the dismissal provisions of Rule 71A.

Relating to the improved - unimproved dichotomy, the suggestion by the Government that a taking based upon a denial of economically viable use "assumes that unimproved land is necessarily held for speculative purposes, while improved land is not" (Brief pp. 27-28), is a straw-man argument. No such assumption is present in the analysis presented by Petitioner. The distinction rests on no more complicated a fact than that in one case property is productive of income while in the other it is not productive of income. In the case of unimproved property, a condemnation action may deprive an owner of all economically viable use, while in the case of improved, income-producing property, the owner may continue to receive economic benefits (although perhaps at reduced levels) during the pendency of the condemnation and therefore not be deprived of "all economically viable use".

Nor does the suggested rule (under any of the analyses suggested by Petitioner) operate as a windfall to owners of income-producing property (as the Government suggests, Brief, p. 29). Under a rule applicable to all straight condemnations, as noted by Petitioner in its Brief (pp. 46-47), if the landowner continues to receive economic benefits during the pendency of the condemnation, such benefits would reduce (or perhaps even supplant) any interest which might otherwise be due.

II. The Taking Question is a Judicial, not Congressional, Determination.

In several portions of its Brief, the Government purports to stress the intent of Congress regarding condemnation procedures as having (apparently) strong, if not controlling, influence on the taking question. Thus, reference is made to:

1. A statutory alternative to straight condemnation (40 U.S.C. § 258a, see Brief, p. 11);

2. Congressional directives to use the declaration of taking procedure only in emergency situations (*id*);

3. The alleged conformity of the judgment of the Court of Appeals to the "evident congressional intent" (*id.*, p. 16);

4. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 et seq. (*id.*, p. 19);

5. The fact that Congress did not authorize either a legislative taking or a declaration of taking in the act creating the Big Thicket Preserve (except, in the latter case, in the event of an emergency) (16 U.S.C. § 698, Brief p. 24).

Such matters are interesting, and certainly demonstrate that Congress is watching the purse strings, but they have utterly no bearing on whether a taking occurred in this case prior to the payment of the award. The effect of the pendency of the condemnation is what it is irrespective of Congressional intent and whether that effect is a taking is a judicial question, *Shoemaker v. United States*, supra; *Monongahela Navigation Co. v. United States*, 148 U.S.

312 (1893); *Seaboard Airline Railway Co. v. United States,* 299 U.S. 581 (1923); *Albert Hanson Lumber Company v. United States,* supra, and *Davis v. Newton Coal Co.,* 267 U.S. 292 (1925), as to which the desire of Congress to limit expenditures or to provide statutory alternatives is immaterial.

III. The "Taking" and "Just Compensation" Issues are Triable in One Action.

The Government suggests (Brief, pp. 24-25) that to the extent Kirby's claim is for an interference with property rights prior to payment of the award such claim is as one for an actual seizure, i.e., an "inverse condemnation" claim, as to which the jurisdiction of the District Court is limited to claims not exceeding $10,000.00 (28 U.S.C. § 1346). The Government thus openly hints, without citation of authority, that any claim regarding the effects of the exercise of the power of eminent domain where the "damage" is in excess of $10,000.00 must be tried in a separate action in the Court of Claims.

The contention that the taking and just compensation issues must be tried piecemeal in separate actions in a case of this nature is spurious. The Government would equate the effects of its effort to condemn with interferences not involving the power of eminent domain. Thus, as noted by Justice Rehnquist for the Court in *United States v. Clarke,* 445 U.S. 253 (1980) (cited by the Government):

> The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property *when condemnation proceedings have not been instituted.* . . . A condemnation proceeding, by contrast, typi-

> cally involves *an action by the condemnor to effect a taking and acquire title.*

(445 U.S. at p. 257, emphasis supplied.)

It is one thing to cause damage to property rights in the exercise of a regulatory power, or the war power, for instance, in which event the Tucker Act requires the claim, if substantial enough, to be brought in the Court of Claims, but it is quite another thing for the Government to seek to condemn property, to institute suit therefor, and then claim that the effects of the exercise of its power to take amount to an "inverse condemnation".

No authority is cited by the Government for the startling proposition that the entirety of the taking and just compensation issues are not to be tried in the condemnation action instituted by it where the landowner claims that the taking occurred at a time prior to the payment of the award. *Clarke* does not support such a proposition. Many cases exist (see, eg. *Danforth, Brown v. United States,* 263 U.S. 78 (1923), and other cases cited on page 41 of Petitioners Brief) in which essentially the same type of question is raised as here: when, in a condemnation proceeding, did the taking occur? The fact that none of such cases holds that the actions of the Government while pursuing a condemnation effort which are alleged to be a taking can only be litigated in a separate suit by the landowner, not only undermines the Government's position, but may be said to establish the contrary by the long acceptance of the practice of including all taking and just compensation issues in the condemnation proceeding.[4]

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4. It would be only in the situation where the Government dismisses or abandons the condemnation that the landowner would be required to resort to the Court of Claims for the recovery of his damages, subject to the possible applicability of Rule 71A to the dismissal in the District Court.

IV. The Valuation "Solution" Urged by the Government Only Aggravates the Problem.

While recognizing that the date of taking establishes the date of valuation and that the trial date often bears no relationship to the usually subsequent date of taking (Brief, p. 15), the Government suggests that the solution, where there is a delay in payment, is to have a subsequent valuation hearing. Petitioner submits that this time-consuming and expensive procedure would not be necessary if a firm date of taking is established early in the proceedings. The correct and final valuation date should be known at the time of the first (and hopefully, only) valuation hearing. The Government's suggestion would only add to the burdens of already crowded court dockets. It would also create insuperable problems where the value of the property has been affected by the project itself: improvements may have deteriorated or the value of the property (improved or unimproved) may have decreased by reason of inclusion in or the proximity of the project. The point is, the landowner should not be required to undergo the tortuous ritual proposed by the Government when a fairer procedure can establish the rights of the parties as of a definite, ascertainable time early enough in the proceedings to allow the trial to be conducted with a definite date of taking.

Petitioner is fully aware (contrary to the Government's observation in note 24, p. 23) that the establishment of an early date of taking establishes an early valuation date and that in a rising market a greater value may be ascertained at a later date. However, when faced with the prospect of multiple trials, any landowner—as should the Government—would prefer the definiteness of a certain

valuation date plus interest on the award through the date of payment rather than to ride the vagaries of the market.

In the same footnote, the Government incorrectly states the result of the earlier valuation on the obligation of the Government to pay, urging, in straw-man fashion, that interest would be due on a later, higher valuation back to an earlier date of taking, resulting in a "double recovery". The problem with such assertion is that there is no later, higher valuation. Petitioner of course does not contend that any valuation other than that determined as of the earlier date of taking would be applicable, and any interest would be payable only on such early valuation.[5]

The Government's contention that there is a distinction between market value and interest within the concept of just compensation does not establish that interest is not an appropriate measure of just compensation. Such contention, first, presumes that the date of taking must be subsequent to the date of valuation and that there must be a second valuation hearing—a situation which adoption of Kirby's contention here will correct—and, second, is inconsistent with this Court's views, expressed in *Seaboard Airline Ry. Co. v. United States,* 299 U.S. 581 (1923), *United States v. Rogers,* 255 U.S. 163 (1921),

5. The Government also appears to be asserting in such footnote that the stipulation made by the parties does not permit the question of alternative valuation dates to arise in this case. If that is the contention, then the Government is telling us that it is not bound by a date of taking stipulation but that Kirby is bound by a date of valuation stipulation. The effect of such a contention would be to deny to Kirby the just compensation due from a subsequent valuation date in the event the taking date urged by the Government is approved by this Court. Such a contention is wholly inconsistent with the Government's position that a subsequent valuation hearing is appropriate here.

Phelps v. United States, 274 U.S. 341 (1927) and *Jacobs v. United States,* 290 U.S. 13 (1933), that "interest" is "a good measure" by which to ascertain "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." 261 U.S. at p. 306.

Finally regarding the valuation questions, the Government urges (Brief, p. 16, n.16) that Petitioner suggests that a problem is caused *because* payment and taking are simultaneous. What Petitioner actually urges is that the problem occurs where *valuation* and taking are *not* simultaneous and that if valuation is determined at a date earlier than the taking (whether or not the taking is at the date of payment of the award) then compensation is not just because Petitioner (absent the payment of interest) has not been paid the value of its property at the time of the taking.[6]

V. The Taking Here is Not of Just an Expectation to Harvest the Timber, But of All Expectations and All Economically Viable Uses.

The Commission found (R. 480) and the District Court adopted the finding (J.A. 21) that the highest and best use of the property condemned was "varied, as portions of it are best used for rural subdivision, waterfront housing and recreational, timber growing and sand pit operations."

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6. Petitioner does not assert, as urged by the Government, that § 258a "provides the only procedure that accords constitutionally adequate protections to the landowner." As pointed out in its Brief (p. 47), Petitioner recognizes that the Government has a choice between the different methods of condemnation. If it selects § 257 it may delay the payment of the award but, under Petitioner's suggested rule, interest will be accruing during such period of delay.

The effort by the Government to limit the investment-backed expectations to the cutting of timber is unavailing. (Brief, p. 31) Because the greatest return (development for subdivision and recreational use) would require the trees to remain standing, it cannot be presumed that Kirby would have destroyed the highest value by the destruction of the trees. But whatever the use to which the land may have been put, the sticks from Kirby's bundle of property rights which the condemnation action foreclosed included the ability to sell, to sell for development, to develop, to sell the timber, to cut the timber and to mortgage the property. These matters go beyond the effects held not to be takings in *Andrus v. Allard,* 444 U.S. 51 (1979) (prohibition of sale of eagle parts; *query:* Does the Government suggest that a flat prohibition on the sale of *land* would *not* be a taking?) and *Miller v. Schoene,* 276 U.S. 272 (1928) (destruction of trees on nuisance basis to protect nearby commercial apple trees) and are not mere reductions in value as involved in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), cited by the Government. The effects of the condemnation *totally* deprived Kirby of any viable economic use. Under current taking analysis, these effects constituted a taking. See *Penn Central,* supra.

The Government also misperceives the importance of the moratorium (Brief, p. 32). Kirby does not refer to it as an event which "took" its property, but as an event on which Congress relied in the removal of the legislative taking provision from the bill then before it (S. Rep. No. 875, 93d Cong. 2d Sess. U.S. Code Cong. & Ad. News, 5558). If "fairness" is to be served in the taking process, the cooperation extended to the Government by Kirby

should be considered. In this respect, the fact that the Government now claims that such cooperation amounted to a donation (Brief, p. 32, n.33) is nothing short of astounding.

VI. The Government's Suggestion that the Landowner Must Provoke a Taking is Lawless and Irresponsible.

The Government offers (Brief, pp. 35-37) two alternative remedies to the taking analysis urged by Petitioner. It suggests that a landowner could (1) seek to enjoin the Government from "activities that adversely affect his property" (*id.* p. 35) or (2) provoke the Government into filing a Declaration of Taking under § 258a by engaging in on-site activities contrary to the purpose of the condemnation (*id.*, p. 36) (suggesting that the Government would "probably" have filed the declaration here if Kirby had ended the moratorium by cutting the trees).

These suggestions are both amazing and in the latter case, shocking. First, it is obvious that no injunction would be granted preventing the Government from filing and pursuing its condemnation suit—for it is the effect of such a suit, and not physical activities on the premises which "adversely affect (the) property" in this and similar cases.

Second, the suggestion of self-help remedies by the landowner only serves to demonstrate the inadequacies of the system under § 257. Such suggestion (1) violates the intent of Congress and its directive to the Interior Department that the land is to be preserved in its original condition, (2) promotes confrontations between citizens

who want the land preserved and the landowner who desires to exercise his right to use his property (a right supported by the Government's suggestion made to this Court), (3) places squarely on the landowner the opprobrium of the despoilation of the wilderness, and (4) subverts the rule of law and its processes as the proper means of resolving conflicts between the Government and the citizens of this country.

These factors, resulting from contentions made to the highest Court in the land by the Justice Department of a government presumably premised on the rule of law, amply demonstrate the need for a decision here which protects the interest of the landowner from excesses practiced by the sovereign. Based simply on a fairness standard, it is wholly unfair that the Government should be entitled to initiate condemnation proceedings, to delay payment of an award and then contend, after the award is paid and the land unquestionably taken, that the landowner should have acted in a lawless fashion—contrary to the will of Congress—in order to protect his rights. The system which would allow such thinking must be changed. Clearly, under the taking analyses urged by Petitioner, such results could not occur.

CONCLUSION

The Government, in essence, bases its position before this Court on a stilted reading of *Danforth* and nothing more. Its efforts to reply to Petitioner's salient points are mere dissemblance, without substance. Petitioner respectfully submits that its contentions correctly set forth the law and policy which under the Fifth Amendment control

the determination of the questions before the Court. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE LAUGHLIN RECREATIONAL ENTERPRISES, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

With the consent of the parties, Laughlin Recreational Enterprises, Inc. (Laughlin) files this Amicus Curiae Brief in support of the Petitioner. The letters of consent are filed with the Clerk.

Laughlin has a condemnation case pending in the Ninth Circuit Court of Appeals, in which a 320 acre parcel of Laughlin's property is being acquired to enlarge the Lake Mead National Recreational Area. (*U.S. v. 319.88 Acres*, 9th Cir. No. 83-2080)

Like the case at bench, *319.88 Acres* is a "straight" condemnation under 40 USC §257. Pre-trial possession was not sought. There was considerable delay between the filing of the complaint and recording of a lis pendens in October 1976 and the entry of judgment in April 1983. The judgment has not yet been paid. The property is in a natural state and the United States wants to keep it that way.

As in the case at bench, the District Judge believed that the pendency of the suit and Laughlin's consequent inability to make any use of the property had injured Laughlin.

However, because of a belief that 40 USC §257 gives the United States the right to back out of the acquisition at any time before the judgment is paid, the District Judge felt that Congress had forbidden the award of pre-judgment interest to compensate for that injury.

The appeal from the portion of the judgment denying interest is awaiting argument before the Ninth Circuit. It was set to be orally argued on December 16, 1983. However, on motion of the United States, the matter was taken off calendar pending this Court's determination of the case at bench.

Because Laughlin's case will be significantly influenced, if not determined, by the decision at bench, the parties agreed that Laughlin could file this Amicus Curiae brief, seeking to amplify the analysis in support of the Petitioner.

SUMMARY OF ARGUMENT

This Court has been no stranger to "the taking issue" in recent years. Generically, the issue is whether actions of a government agency have so encroached on the rights of private property owners that the property has been taken, requiring compensation under the Fifth and Fourteenth Amendments.

The cases recently addressed by this Court have been regulation cases, where a police power regulation is claimed to have effected a taking either by restricting the owner's ability to use the property (*Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104; *Agins v. City of Tiburon* [1980] 447 U.S. 255; *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 U.S. 621) or by permitting others to use the property (*Kaiser-Aetna v. United States* [1979] 444 U.S. 164; *Pruneyard Shopping Center v. Robins* [1980] 447 U.S. 74; *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 U.S. 419, 73 L.Ed. 2d 868).

This case presents a different aspect of the taking issue — one equally deserving of this Court's attention.

The issues here focus on the situation where a government agency decides to acquire undeveloped private property for preservation in its natural state, announces its intention, files suit to condemn, stultifies the use of the property by its announced intention and pending suit to condemn, and then leaves the property owner helplessly — and ever so slowly — twisting in the wind, awaiting payment of his Constitutionally promised just compensation.

This Court has not directly addressed this aspect of condemnation delay. It has, however, held that compensation in the form of pre-judgment interest must be paid where payment is delayed after pre-trial possession is taken. (E.g., *Jacobs v. United States* [1933] 290 U.S.

13, 16-17; *Seaboard Air Line R. Co. v. United States* [1923] 261 U.S. 299, 306; *Shoshone Tribe v. United States* [1937] 299 U.S. 476, 497.) And other courts have held that compensation for condemnation delay is Constitutionally mandated. (E.g., *United States v. 15.65 Acres* [9th Cir. 1982] 689 F.2d 1329, 1334; *Foster v. City of Detroit* [6th Cir. 1968] 405 F.2d 138, *affirming* [E.D. Mich. 1966] 254 F.Supp. 655.)

This court has also held that whether the actions of a government agency have de facto taken property must be examined on a case-by-case basis to determine the impact of the government activity on the property owner. (E.g., *Loretto*, 458 U.S. at ____, 73 L.Ed.2d at 876; *Penn Central*, 438 U.S. at 124.) Physical invasion has expressly been held not to be required. (*Penn Central*, 438 U.S. at 122, fn. 25.) Nor can any legislative action determine what a taking is, or the measure of Constitutionally mandated just compensation. (*Monongahela Navigation Co. v. U.S.* [1893] 148 U.S. 312, 327; *Seaboard*, 261 U.S. at 306)

The Fifth Circuit in the case at bench (and the District Court in Laughlin's case) disregarded these fundamental precepts and held that Congress, by enacting 40 USC §257 and giving the United States the option to "... back out of the project up until the date of payment..." (*U.S. v. 2,175.86 Acres* [5th Cir. 1983] 696 F.2d 351, 356) has decreed that there is no "taking" until payment is tendered.

This Court's attention is needed to relieve the plight of owners of undeveloped land who are prevented by the pendency of condemnation proceedings from making any use of their land. The concept of compensation for a temporary taking, developed in Justice Brennan's four-

Justice dissenting opinion in *San Diego Gas & Elec. Co.*[1] seems eminently adaptable to the period which preceeds payment.

WHETHER THERE HAS BEEN A DE FACTO TAKING OF PROPERTY REQUIRES EXAMINATION OF THE FACTS. IT CANNOT BE DETERMINED BY CONGRESSIONAL FIAT OR AGENCY WHIM

"De facto taking" is a common sense concept applied where the actions of a government agency interfere so significantly with a property owner's ability to use his property that the property is adjudged to have been taken by the governmental action. In such a circumstance, the taking is held to have occurred de facto even though legal title has not passed and even though a condemnation action may not yet have been filed. (See *2 Nichols on Eminent Domain* [3d ed. 1975] §6.3, p. 6-65.)

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[1]As this Court may be aware, because of Justice Rehnquist's concurring opinion in *San Diego Gas & Elec. Co.*, other courts have generally acknowledged Justice Brennan's dissent as expressing the views of a majority of this Court on the substantive law discussed. *Hernandez v. City of Lafayette* (5th Cir. 1981) 643 F.2d 1188, 1199-1200; *Devines v. Maier* (7th Cir. 1981) 665 F.2d 138, 152; *Barbian v. Panagis* (7th Cir. 1982) 694 F.2d 476, 482, fn. 5; *In re Aircrash in Bali* (9th Cir. 1982) 684 F.2d 1301, 1311, fn. 7; *Martino v. Santa Clara Valley Water Dist.* (9th Cir. 1983) 703 F.2d 1141, 1148; *Fountain v. Metro Atlanta Rapid Transit Authority* (11th Cir. 1982) 678 F.2d 1038, 1043; *Burrows v. City of Keene* (NH 1981) 432 A.2d 15, 20; *Pratt v. State* (Minn. 1981) 309 NW 2d 767, 774; *Rippley v. City of Lincoln* (ND 1983) 330 NW 2d 505, 510; *Zinn v. State* (Wis 1983) 334 NW 2d 67, 72; *Kinzli v. City of Santa Cruz* (ND Cal 1982) 539 F.Supp. 887, 896; *Sheerr v. Township of Evesham* (NJ Super 1982) 445 A.2d 46. But see *Citadel Corp. v. Puerto Rico Highway Auth.* (1st Cir. 1982) 695 F.2d 31, 33, fn. 4.

In deciding whether the Fifth and Fourteenth Amendments command a finding that a taking has occurred de facto and compensation must be paid, this Court described the task of the judiciary as:

> ". . . determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [Citation]" (*Penn Central*, 438 U.S. at 124)

By definition, to determine whether a taking (or anything else) is accomplished "de facto," the facts must be examined with an open mental attitude to determine whether that which is forbidden to be done directly has been accomplished covertly.[2]

Indeed, in making decisions regarding de facto happenings in other contexts, it is plain that this Court has insisted on examining the underlying facts and their impact on the parties. (E.g., *Board of Education v. Harris* [1979] 444 U.S. 130 [de facto segregation]; *U.S. v. Citizens and Southern Nat'l Bank* [1975] 422 U.S. 86 [de facto branch banks]; *Hughes Tool Co. v. TWA* [1973] 409 U.S. 363 [de facto corporate control]; *Griffin v. Illinois* [1956] 351 U.S. 12 [de facto denial of appeal rights].)

In the property context, Justice Brennan aptly summed up the rule in his four-Justice dissenting opinion in *San Diego Gas & Elec. Co.*, 450 U.S. at 652-653:

> "But 'the Constitution measures a taking of property not by what a State says, or by what it

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[2]In the words of Justice Frankfurter, the Constitution proscribes ". . . sophisticated as well as simple-minded . . ." depredations. (*Lane v. Wilson* [1939] 307 U.S. 268, 275)

> intends, but by what it does.' [Citations.] It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property. [Citations.]"

The factors which must be examined to determine the existence of a de facto taking are the economic impact of the governmental action on the property owner, the extent to which the governmental action interferes with reasonable, investment-backed expectations, and the character of the governmental action. (*Loretto,* 458 U.S. at ____, 73 L.Ed.2d at 876; *Penn Central,* 438 U.S. at 124)

In cases like this one (or Laughlin's), the facts demonstrate that a de facto taking can occur long before the de jure passage of title (which follows payment of the judicially determined just compensation). Please recall that in this class of cases:

- the property is undeveloped;
- the United States wants to acquire the property to retain it in its natural condition;
- a condemnation complaint is filed and a lis pendens recorded, giving constructive notice to the world that the property is being acquired for preservation; and
- the pendency of the condemnation proceeding destroys the property owner's ability to use, sell, lease, or even borrow on the security of the property.

Compare these facts with this Court's criteria for a de facto taking:

- The economic impact on the property owner is devastating. The property can neither be put to any use nor sold to others.
- The interference with reasonable, investment-backed expectations is total. Property is purchased with the expectation that it can either be used or sold. Even buying property as an "investment" implies that the owner needs to be able to sell it when he sees fit. The pendency of a condemnation action frustrates such expectations.
- The character of the governmental action is property acquisition. To the extent the government needs to forbid the use and marketability of the property while deciding whether to buy it, the burden of paying for that stultification should be on the government, not the hapless owner.

Applying this Court's *Loretto/Penn Central* analysis, these facts show a de facto taking. In *U.S. v. General Motors* (1945) 323 U.S. 373, this Court defined property as ". . . the right to possess, use and dispose of [a thing]." (323 U.S. at 378) In *Kaiser Aetna*, this Court held that governmental "removal" of one important "stick" in the bundle of property rights (there, the right to exclusive possession) is a de facto taking. (444 U.S. at 176; cf *Loretto*, 458 U.S. at ____, 73 L.Ed.2d 822) In this class of cases, the rights of use and disposition are plainly removed from the property owner's bundle.

UNDEVELOPED PROPERTY IS DE FACTO TAKEN WHEN CONDEMNATION TAKES YEARS TO CONCLUDE

Owning undeveloped land is not the same as owning land which is improved and producing income.

When income-producing property is condemned, the owner remains able to use it until the condemnor obtains a right to possession. While his ability to sell it may be hampered, the pending acquisition does not deprive him of all use, as his income continues.

By contrast, when undeveloped land is condemned, and the governmental intent is to preserve it in a state of nature, the owner is left holding a very empty bag. He can neither sell or rent it to another nor borrow on its security. As the lengthy proceedings at bench demonstrate, no wise person wants to buy a participant's seat at a condemnation trial. (See *Miller v. U.S.* [Ct. Cl. 1980] 620 F.2d 812, 839; *Drakes Bay Land Co. v. U.S.* [Ct. Cl. 1970] 424 F.2d 574, 586.) The filing of the complaint (particularly when accompanied by the recording of a lis pendens, as occurred at bench and in Laughlin's case) gives notice that the property is slated for acquisition and preservation, thus destroying any market for it.[3]

Even holding undeveloped property as an investment (or for "speculation," as some pejoratively characterize it) means more than owning it until it hypothetically reaches its maximum value. It means being *able* to sell it

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[3]The crippling impact of a lis pendens has been noted judicially. Its presence has contributed to findings of taking (See *Martino,* 703 F.2d at 1147; *Foster v. City of Detroit* [ED Mich 1966] 254 F.Supp. 655, 662, *aff'd* [6th Cir. 1968] 405 F.2d 138; *Thomas W. Garland, Inc., v. City of St. Louis* [8th Cir. 1979] 596 F.2d 784, 789; *Board of Education v. Clarke* [Mich.App. 1979] 280 NW 2d 574, 576.)

when one's needs or wisdom dictate. The filing of a condemnation action transforms the property into an exceedingly illiquid asset.[4]

The Ninth Circuit understands that. (*U.S. v. 15.65 Acres* [9th Cir. 1982] 689 F.2d 1329, 1334; *U.S. v. 156.81 Acres* [9th Cir. 1982] 671 F.2d 336, 339) The Fifth Circuit does not. (*U.S. v. 2,175.86 Acres* [5th Cir. 1983] 696 F.2d 351, 357; but see the dissenting opinion of Judge Jolly, 696 F.2d at 358-359.)

Those state courts which have examined the subject agree with the Ninth Circuit. In addition to *State v. Nordstrom* (NJ 1969) 253 A.2d 163 and *Stewart & Grindle, Inc. v. State* (Alas 1974) 524 P.2d 1242, discussed in the Petitioner's brief on the merits, see *Lange v. State* (Wash. 1976) 547 P.2d 282 and *Osborn v. City of Cedar Rapids* (Iowa 1982) 324 NW 2d 471. As the Washington Supreme Court explained in *Lange*, 547 P.2d at 287-288:

> "Such a result was clearly foreseeable in this situation because the property was vacant and in the process of being developed. Appellant Lange had been engaged for 25 years in the business of developing real property for residential building sites. Prior to any knowledge of the highway project on the part of appellant or the public, appellant had his property annexed to the local sewer district, undertook to survey and grade streets over a portion of the tract, and imposed by deed conveyance on all of the land, mutual easements for sewer, water, and access. Given

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[4]Indeed, there is nothing fanciful in comparing it to the "white elephant" of regal Siam. Like the elephant, the undeveloped property requires care and feeding (in the form of mortgage, tax, and liability insurance payments), but produces no useful return.

appellant's business, his property was akin to an inventory of goods. In these respects, *appellant occupies a position different from that of the typical owner of a house or store which is the subject of condemnation activity.* The home or store owner does not purchase the land with the sole objective of developing and marketing the land and will not take major steps to accomplish this objective. The impairment of marketability, financing, and income is not as clearly foreseeable in such circumstances. *The home or store owner may suffer from a general market decline but his sole purpose is not destroyed,* since he may continue to use the property, derive some income or benefit from it, and thus moderate the market decline. [Citation] . . .

"In this case, *the effect of the condemnation activity was to chain appellant to his land in a falling real estate market.* Once the state manifested its unequivocal intent to appropriate the Lange property *appellants were precluded from exercising their business judgment and selling the property before the market fell further.* Moreover, appellants were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus, *appellants were deprived of the most important incidents of ownership, the rights to use and alienate property.* In addition, because the condemnation did in fact take place, appellants were prevented from holding their property, as other owners would be able to do, until economic conditions improved and market values rose again." (Emphasis added.)

The reality of the situation confronting the owner of undeveloped land during proceedings to acquire it for park or wilderness purposes was aptly summarized by the Court of Claims in *Drakes Bay Land Co. v. U.S.* (Ct. Cl. 1970) 424 F.2d 574, 586:

> "Thus plaintiff remains without a market for its land. *The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation of seashore realty.* The public sector, namely the National Park Service, is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure." (Emphasis added.)

When undeveloped land is being condemned, the owner suffers from delay in ways which differ significantly from the owner of income-producing property. The compensation rules mandated by the Constitution ought to acknowledge the difference.

THE PERIOD DURING WHICH THE UNITED STATES IS PERMITTED TO "TEST THE WATER" AND "BACK AWAY" FROM THE ACQUISITION IF IT DOESN'T LIKE THE PRICE CAN BE VIEWED AS A TEMPORARY TAKING.

The Fifth Circuit in the case at bench (and the District Court in Laughlin's case) have an unduly rigid view of the judiciary's duty to ensure that just compensation is paid. Their theory that 40 USC §257 precludes any award of pre-judgment interest conflicts with this Court's holdings that legislation cannot inhibit the judicial determination of just compensation (*Seaboard*, 261 U.S. at 306; *Monongahela*, 148 U.S. at 327), and that the foundation of all

condemnation law is fairness (*U.S. v. Fuller* [1973] 409 U.S. 488, 490; *U.S. v. Virginia E & P Co.* [1961] 365 U.S. 624, 631).

The Ninth Circuit knows better:

> "The great advantage to the government of proceeding under 40 U.S.C. §257 is that it can obtain a judicial valuation of the property without committing itself to condemn it. [Citations.] *This flexibility must be harmonized with the just compensation requirement.*" (*U.S. v. 156.81 Acres* [9th Cir. 1982] 671 F.2d 336, 339; emphasis added.)

The Ninth Circuit's flexible approach seems required by the settled precept that statutes are to be interpreted in harmony with the Constitution, to provide compensation for a taking. (*Phelps v. U.S.* [1927] 274 U.S. 341, 344; *Miller v. U.S.* [Ct. Cl. 1980] 650 F.2d 812, 837-838) By contrast, the Fifth Circuit's rigid approach in the case at bench makes 40 USC §257 unconstitutional by precluding compensation for a taking.

One way to harmonize 40 USC §257 with the just compensation requirement is to view as a temporary taking the period before judgment during which the property owner is deprived of the benefits of ownership.

A good analytical starting point is Justice Brennan's four-Justice dissenting opinion in *San Diego Gas & Elec. Co.*

San Diego Gas & Elec. Co. dealt with a taking effected by an overly stringent land use regulation. Justice Brennan expressed the view that the government be given the option of rescinding the regulation and paying compensation for a temporary taking if it did not like the alternative of retaining the regulation and buying the property.

The reason behind the theory was the Constitutional requirement of fairness:

> "If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken. [Citations.]
>
> "The fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent irreversible 'takings.' " (450 U.S. at 656-657)

The facts at bench are that the government has stultified the use of property by the pendency of a condemnation action in order to permit the government the option of buying the property if it finds the just compensation award an acceptable price. If the price is not acceptable, the government may abandon the proceedings and lift the cloud of condemnation from the property.

Interestingly, in *San Diego Gas & Elec. Co.*, Justice Brennan justified use of his temporary taking theory by analogizing regulatory takings to abandoned condemnation cases:

> "Just as the government may cancel condemnation proceedings before passage of title, [citation], or abandon property it has temporarily occupied or invaded, [citation], it must have the same power to rescind a regulatory 'taking.' As the Court has noted, 'an abandonment does not prejudice the property owner. It merely results in an alteration of the property interest taken — from full ownership to one of temporary use and occupation. . . . In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.' [Citations.]" (450 U.S. at 658)

Thus, the analogy comes full circle: from the law regarding abandonment of direct condemnation actions, Justice Brennan fashioned a theory of temporary taking for severely restrictive regulations. That view, now clearly expressed by Justice Brennan, supplies the analysis for finding a temporary taking in a direct condemnation case where the lengthy pendency of the action injures the property owner by taking his rights of use and alienation.

Justice Brennan's theory of temporary takings is beginning to be felt in state courts. (*Rippley v. City of Lincoln* [ND 1983] 330 NW 2d 505, 510-511; *Zinn v. State* [Wis. 1983] 334 NW 2d 67, 72-74) It merits application here.

IF THE GOVERNMENT NEEDS TO FREEZE THE MARKET FOR A PARTICULAR PIECE OF PROPERTY WHILE DECIDING WHETHER TO BUY IT, IT SHOULD DO AS ANY CITIZEN WOULD HAVE TO DO: BUY AN OPTION.

When the United States says it needs the flexibility provided by 40 USC §257 to permit it to "test the water," determine the price, and then exercise its judgment whether to buy or "back away," it is describing a tool presently available to any potential purchaser in the marketplace: an option. If an individual needs time (be it one year or ten) to decide whether to buy a piece of land, and he wants to ensure that nothing happens to it in the meantime, he buys an option. He *buys* the time needed to think and plan and change his intent. That protects the rights of *both* parties.

By contrast, the scheme established by 40 USC §257, as rigidly interpreted by the Fifth Circuit in the case at bench and by the District Court in Laughlin's case, protects only the government. It *compels* the property owner to *give* the government an option and, when the land is undeveloped, deprives the property owner of any ability to use the property during the "option" period.

Courts are beginning to recognize the appropriateness of the option analogy to governmental actions which freeze the use of property while the government makes up its mind. (E.g., *Lomarch Corp. v. Mayor & Common Council* [NJ 1968] 237 A.2d 881 [designating property on official map as "park" while City decided whether to buy it was the taking of a one year option which required compensation]; *Suess Builders Co. v. City of Beaverton* [Ore 1982] 656 P.2d 306 [regulation freezing use of land while government decided what to do was equivalent to seizure of an option which required compensation]; see

also *6th Camden Corp. v. Evesham Township* [DNJ 1976] 420 F.Supp. 709, 728, fn. 17 [citing *Lomarch* result with approval]; *Maryland-Nat. Capital Park v. Chadwick* [Md. 1979] 405 A.2d 241, 248-249 [discussing *Lomarch* result approvingly].)

The need of government to plan can hardly be denied. However, when such planning effects a taking of private property by depriving the owner of all economically viable use, compensation is mandated.

WHEN THE USE OF UNDEVELOPED PROPERTY IS STULTIFIED BY THE PENDENCY OF A CONDEMNATION ACTION, INTEREST (AS A PART OF JUST COMPENSATION) SHOULD BEGIN NO LATER THAN THE DATE THE COMPLAINT WAS FILED. IF THE FACTS SHOW INTERFERENCE BEFORE THAT, INTEREST SHOULD BEGIN AT AN EARLIER DATE

In examining the course of a condemnation action, there are four dates which are capable of confusion if not kept in focus. They are the dates of:

- taking;
- value;
- condition; and
- passage of title.

In any given case, some of these dates may be the same.

Date of Taking

As noted earlier, the date of taking is essentially a fact question.

If the Declaration of Taking procedure (40 USC §258a) is used, rather than the "straight" condemnation (40 USC §257) employed at bench, the Declaration may establish the date of taking.

If pre-judgment possession is taken, that may establish a date of taking.

Please note, however, that if possession is not taken until the action has been pending for some time, and other factors have already stultified use of the property, then the date of taking may precede the date of possession.

Date of Value

Some date must be given the appraisers (and the trier of fact) for valuing the property, as values change with time.

If the date of taking has clearly preceded the date of trial, that date may also be the date of value. Otherwise, the date of value may be more or less arbitrary, such as the date the complaint was filed, or the date of trial. Though this Court has generally said that the date of value should be the date of taking (*Phelps v. U.S.* [1927] 274 U.S. 341), that general rule may be impossible to apply where the trier of fact must determine the date of taking after reviewing the evidence. Thus, the date of value may or may not also be the date of taking.

Date of Condition

It has long been the rule that some activities which occur during property acquisition must be disregarded in determining value. (*U.S. v. Miller* [1943] 317 U.S. 369; 42 USC §4651[3].) Thus, the property is sometimes valued as of its condition on a particular date, disregarding, for example the impact of the acquisition on the property's value. This date of condition may or may not also be the date of taking.

Date of Passage of Title

Title passes in one of two ways in a condemnation case, depending on the manner of acquisition chosen by the

government. Under the Declaration of Taking Act (40 USC §258a), title passes at the *beginning* of the condemnation action. In a "straight" condemnation (40 USC §257), like the one at bench, title passes *after* judgment, when compensation is paid.

It is almost universally unrealistic to say that the date of passage of title is the date of taking, though that is just as universally urged by the government and sometimes (as in the Fifth Circuit decision at bench) accepted by courts.

When, as at bench, use of the property is foreclosed years before title passes, it can be nothing short of fiction to use the date of passage of title as the date of taking. One anomaly, noted by Kirby in its brief, is that if the date of passage of title is viewed as the date of taking, then the property owner will *never* receive the value of the property contemporaneous with the taking. (Compare *Phelps v. U.S.* [1927] 274 U.S. 341.) As at bench, the property may have been valued *years before* passage of title. Thus, the date of passage of title may, or may not, be the date of taking.

Proposed Rule

Because *none* of the dates noted above will *always* represent the date of taking, none commends itself as the basis for a general rule. All have an element of arbitrariness which is counter to the fundamental precept of fairness underlying the just compensation clause. (Compare *U.S. v. Fuller* [1973] 409 U.S. 488, 490.)

Thus, for this class of cases, where undeveloped land is being condemned, Laughlin recommends a two-step process be used:

- First, the date the complaint is filed be presumed to be the date of taking, as that event generally forecloses use or alienation of undeveloped property.

- Second, if the property owner can produce evidence showing that stultification of use was caused by the government's actions before the complaint was filed, then the date of such stultification is the date of taking.

Such a rule is consistent with both fairness and reality. No one disputes the need for government to plan, and to do so publicly. Indeed, such planning is laudable. However, by the time the complaint is filed, the planning process is at an end. A decision has been made to at least "test the water" and see if the property can be acquired at an acceptable price. From that point on, the property owner can no longer deal with the property as though it were his own. The government has seized at least an option on the property, foreclosing significant use.[5]

The proposed rule acknowledges reality. General use of any of the other dates discussed herein would have as its sole virtue ease of application. The arbitrary results, however, would often be out of harmony with the guarantee of fairness in the just compensation clause.

CONCLUSION

When a citizen is asked to give up his property for the common weal, the determination of his Constitutionally mandated just compensation is too delicate a matter to be relegated to the whim of either Congress or the bureaucracy. Its touchstones are fairness and equity, matters in which the judiciary is supreme.

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[5]Of course, in cases where the property owner continues to receive income or use the property, then the value of possession should be offset against pre-judgment interest. (See, e.g., Cal. Code Civ. Proc. §1268.330.)

The owner of undeveloped land suffers significantly during the pendency of a condemnation action. In virtually all cases, his ability to use or alienate the property is denied by the condemnation cloud hovering overhead.

During that period, the property is de facto taken, even if neither title nor possession has been transferred.

To preserve the government's planning flexibility while protecting the property rights of innocent landowners, it seems Constitutionally appropriate to view the filing of a condemnation complaint against undeveloped property as a temporary taking.

If, after the property is valued, the government decides not to buy it, the property owner would be paid for the temporary taking by awarding interest on the amount of the judgment from the filing of the complaint until abandonment of the taking. If the government completes the property acquisition, the temporary taking would become permanent. Such a result would give the government what it wants (the opportunity to decide whether to acquire the property) while acknowledging the real economic impact of such action on the property owner. Fairness calls for that.

Respectfully submitted,
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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405; that on December 22, 1983, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

United States Supreme Court
1 First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

Rex E. Lee
Solicitor General
United States Department
of Justice
Washington, D.C. 20530

Joe G. Roady
3700 First City Tower
Houston, Texas 77002

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 22, 1983, at Santa Monica, California.

Kirk W. Harney
(Original signed)

No. 82-1994-CFX
Status: GRANTED

Title: Kirby Forest Industries, Inc., Petitioner
v.
United States

Docketed:
June 7, 1983

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Roady, Joe G.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 7 1983	G	Petition for writ of certiorari filed.
2	Jul 8 1983		Brief of respondent in opposition filed.
3	Jul 13 1983		DISTRIBUTED. September 26, 1983
4	Jul 21 1983	X	Reply brief of petitioner Kirby Forest Indus., Inc. filed.
6	Oct 3 1983		REDISTRIBUTED. October 7, 1983
8	Oct 11 1983		REDISTRIBUTED. October 14, 1983
9	Oct 17 1983		Petition GRANTED.
			**********
10	Nov 4 1983		Record filed.
11	Nov 4 1983		Certified original record & C.A. proceedings, 6 volumes received.
12	Nov 30 1983		Brief of petitioner Kirby Forest Indus., Inc. filed.
13	Nov 30 1983		Joint appendix filed.
14	Dec 23 1983		Brief amicus curiae of Laughlin Recreational Enterprises, Inc. filed.
16	Dec 29 1983		Order extending time to file brief of responcent on the merits until January 9, 1984.
17	Jan 6 1984		Brief of respondent United States filed.
18	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 22, 1984. (4th case)
19	Jan 18 1984		CIRCULATED.
20	Feb 2 1984	X	Reply brief of petitioner Kirby Forest Indus., Inc. filed.
21	Feb 22 1984		ARGUED.